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In The

Supreme Court of the United States

October Term, 1998

KIDDER, PEABODY & CO. INCORPORATED, *et al.*,

Petitioners,

v.

JOHN W. MATHEWS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 107 of the Private Securities Litigation Reform Act of 1995 amended Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO") to eliminate the jurisdictional predicate, and substantive basis, for RICO claims grounded on conduct actionable as securities fraud ("RICO Amendment"). The lower courts declined to apply the RICO Amendment to dismiss this case which was pending on the date of enactment. The questions presented are:

1. When Congress ousts (as distinguished from confers) federal jurisdiction over causes of action without reserving federal jurisdiction over pending claims, are the federal courts deprived of the power to adjudicate such pending cases?

2. Did the lower court misapply this Court's retroactivity decisions in construing the RICO Amendment and concluding that its elimination of securities fraud-based RICO actions does not apply to pending cases?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Third Circuit are (1) Petitioners (appellants below): Kidder, Peabody & Co. Incorporated; KP Realty Advisers, Inc.; HSM, Inc.; Henry S. Miller Co.; Henry S. Miller Management Corporation; Henry S. Miller Appraisal Corporation; HSM Real Estate Securities Corporation; and Miller Real Estate Services Corporation and (2) Respondents (appellees below): John W. Mathews; Carole Ann Nuckton; Patricia J. Lester; Jordan Brodsky; Thomas C. Chestney; Deborah W. Troemner; William J. Waterman, Jr.; Vernon L. Schatz; Melvin H. Roots; Robert J. Holton; James J. Boyle; David L. Robinson; Vincent J. Panepinto; Dominic A. Martell; Francis B. Borcato; John J. Dougherty and Patrick D. Finley, Trustees of the Operative Plasterers & Cement Masons Local Union Officer & Employee Pension Fund; Lee Crossman; Susanne Diane Anderson and Larry C. Anderson; George P. Arnold and Ann M. Arnold; and Donald J. Aiebel, on behalf of themselves and all others similarly situated.

Pursuant to this Court's Rule 29.6, Petitioners Kidder, Peabody & Co. Incorporated and KP Realty Advisers, Inc. note that Paine Webber Group, Inc. is the parent corporation of Kidder, Peabody & Co. Incorporated which is, in turn, the parent of KP Realty Advisers, Inc.; Petitioners also note that General Electric Company is the former indirect parent of Kidder, Peabody & Co. Incorporated. Petitioners HSM, Inc., Henry S. Miller Co., Henry S. Miller Management Corporation, Henry S. Miller Appraisal Corporation, HSM Real Estate Securities Corporation and Miller Real Estate Services Corporation note

PARTIES TO THE PROCEEDINGS – Continued

that Grubb & Ellis Company is the parent of HSM, Inc., which is, in turn, the parent of HSM Real Estate Securities Corporation and Miller Real Estate Services Corporation. Henry S. Miller Co., Henry S. Miller Management Corporation and Henry S. Miller Appraisal Corporation were each merged into Grubb & Ellis Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Kidder, Peabody & Co. Incorporated, KP Realty Advisers, Inc., HSM, Inc., Henry S. Miller Co., Henry S. Miller Management Corporation, Henry S. Miller Appraisal Corporation, Miller Real Estate Services Corporation and HSM Real Estate Securities Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 161 F.3d 156 (3d Cir. 1998) and is reprinted in the Appendix ("App.") at App. A. The judgment of the United States Court of Appeals for the Third Circuit was entered on November 16, 1998, and an amended judgment was entered on November 20, 1998. The judgment and amended judgment are reprinted at App. B.

The opinion of the district court is reported at 947 F. Supp. 180 (W.D. Pa. 1996), and that opinion and the related order are reprinted at App. C. By order dated January 22, 1997, the district court modified its previous order to include the requisite language to permit an interlocutory appeal. The January 22, 1997 order is reprinted at App. D. The district court also issued two unpublished opinions that relate to this matter. The December 19, 1995 opinion and order are reprinted at App. E, and the September 26, 1996 class certification opinion and order are reprinted at App. F.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1998. This petition is timely filed pursuant to 28 U.S.C. § 2101(c) and Sup. Ct. R. 13. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

Section 1964(c) of RICO was amended by the RICO Amendment of Title I of the Private Securities Litigation Reform Act of 1995 ("Reform Act"), Pub. L. No. 104-67, 109 Stat. 737 (1995), to provide in pertinent part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, *except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962*. . . .

18 U.S.C. § 1964(c) (amendment italicized).

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Congress passed the Reform Act on December 22, 1995. The RICO Amendment of that Act eliminates the basis for federal jurisdiction over, and the statutory

grounds for, RICO claims that are based upon conduct that allegedly was actionable as securities fraud. This civil RICO action was instituted by Plaintiff John W. Mathews in January 1995 and is based on such conduct.

Mathews's Complaint alleged predicate acts of securities fraud relating to three distinct real estate limited partnership offerings organized, offered and sold by Defendants in the mid-1980's. These partnerships are referred to as Funds I, II and III. Although Mathews asserted RICO claims with respect to all three Funds, he had invested only in Fund II. Nevertheless, Mathews sought to represent a class of all persons who had purchased partnership interests in any of the three Funds. Before the Reform Act became law, the district court dismissed Mathews's individual claims with respect to Funds I and III, ruling that he lacked standing to assert such claims, but that court reserved judgment on whether Mathews could represent a class of persons who invested in all three Funds. App. E at 12-17.

After enactment of the Reform Act, the district court held that the new Act did not bar Mathews's previously-filed RICO claims.[1] As the court of appeals noted, the district court concluded that Petitioners' position on the

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[1] After passage of the Reform Act, Mathews sought leave to file an Amended Complaint naming new plaintiffs who invested in Funds I and III. In September 1996, the district court granted Mathews's motion for leave to amend, concluding that the Reform Act did not bar the post-Reform Act claims under Funds I and III alleged by these new plaintiffs. App. C at 19-24. That same day, the district court granted Mathews's motion for certification of a class of all persons who purchased interests in any of the three Funds. App. F.

retroactive application of the Reform Act presented a "serious issue" and certified an interlocutory appeal on that issue. App. A at 8. The court of appeals granted permission to appeal the district court's September 26, 1996 order, as amended on January 22, 1997, and thereafter affirmed the district court's order that the RICO Amendment does not bar Mathews's RICO claims.[2]

II. THE DECISION BELOW

The decision of the court of appeals drew upon this Court's "preeminent recent cases addressing the retrospective application of statutes": *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S. Ct. 1871 (1997); and *Lindh v. Murphy*, 117 S. Ct. 2059 (1997). App. A at 8. In doing so, that court recast the analytical framework laid out in those cases, blending *Landgraf* and *Lindh* to fashion its own, four-part analytical framework to determine whether the RICO Amendment should be applied to this case. Applying this four part analysis, the court reasoned as follows:

1. *Unambiguous Directive*. The court rejected Plaintiff's argument that this case "arises under" the securities laws and is, therefore, subject to Section 108 of the

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[2] The court of appeals declined to consider whether the Reform Act barred Fund I and Fund III claims asserted by the new plaintiffs added in the Amended Complaint *after* passage of the Reform Act, concluding that application of the Reform Act to subsequently-filed claims was not embraced by the January 22, 1997 order which had been certified for interlocutory review. App. A at 3 n.1.

Reform Act ("Applicability Provision") which expressly states that the amendments of Title I of the Act do not apply to private actions "arising under" the securities laws pending on the date of enactment.[3] Thus, the court concluded, Congress had not expressly defined the temporal application of the RICO Amendment. App. A at 14-16.

2. *Congressional Intent on Prospective Application.* Applying normal rules of statutory construction, the Court found no evidence of congressional intent to limit application of the RICO Amendment to future filed cases. App. A at 17-18.

3. *Retroactive Effect.* While agreeing that Section 1964(c) of RICO is "phrased in federal jurisdictional terms," the court rejected Defendants' argument that the RICO Amendment to Section 1964(c) ousted jurisdiction over a category of claims, including Plaintiff's claims, and that this Court's retroactivity jurisprudence, therefore, required application of the Amendment to this case. App. A at 18-26. The court reasoned that, because the RICO Amendment appears to eliminate the basis for both federal court and state court jurisdiction over these RICO claims, the Amendment affects a substantive right and, therefore, has a retroactive effect. App. A at 20.

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[3] Section 108 of the Reform Act provides:

> The amendments made by this title shall not affect or apply to *any private action arising under* Title I of *the Securities Exchange Act of 1934* or Title I of *the Securities Act of 1933*, commenced before and pending on the date of enactment of this Act.

15 U.S.C. § 77l note.

4. *Clear Intent as to Pending Cases.* Finally, in the face of the "strong presumption against retroactivity," the court found no "clear intent" to apply the RICO Amendment to pending cases. App. A at 26-38. The court rejected Defendants' argument that Congress's intent to apply the RICO Amendment to pending cases was established by the plain text of the Act, its apparent purposes and the course of legislative actions that gave shape to the RICO Amendment. The court conceded that its own inference from the text was not necessarily "the correct one, nor even necessarily the most plausible one . . . ." App. A at 32. It acknowledged that "there is some support . . . in the legislative history" for Defendants' argument that "Congress's purpose would be thwarted if the RICO Amendment was not applied retrospectively." App. A at 34. The court assumed, however, that this Court would apply the same presumption to statutes that *eliminate* federal jurisdiction over causes of action (and, in doing so, eliminate the statutory basis for such claims), as it does to statutes that *confer* jurisdiction (and, in doing so, create causes of action). Accordingly, the court affirmed the order of the district court and allowed Mathews to proceed with his RICO claims.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision raises an important and enduring question: the effect on pending cases of congressional actions that withdraw the basis for federal court jurisdiction over categories of cases. The decision of the court of appeals demonstrates the confusion lower courts have encountered in addressing congressional

actions that withdraw federal court jurisdiction and that in doing so may repeal the basis for causes of action or claims for relief. Indeed, the array of decisions from both courts of appeal and district courts relating to the effect of the RICO Amendment demonstrates that those courts have not found adequate guidance in this Court's existing precedents.

The Third Circuit recognized that the RICO Amendment was "literally addressed to the jurisdiction of the federal courts. . . . " App. A at 20. It acknowledged that 18 U.S.C. § 1964(c) was the jurisdictional basis for Plaintiff's claims. It conceded that Plaintiff's claims were squarely within the ambit of the RICO Amendment. Nonetheless, the court concluded that the federal courts should continue to adjudicate a claim for which there was no surviving jurisdictional predicate or statutory basis. In addition, the court of appeals reformulated the analytical framework established in this Court's *Landgraf* decision and, in doing so, erroneously concluded that Congress did not intend the RICO Amendment to apply to pending cases. Finally, the circuit court ignored the teaching of *Lindh* that normal rules of statutory construction can be used to determine Congressional intent. In sum, the court's holding misconstrued the jurisdictional effect of the RICO Amendment and misapplied the retroactivity analysis and interpretive standards applicable to such statutes.

The court's failure to find adequate guidance in this Court's retroactivity decisions will – if uncorrected here and if followed by other courts – necessarily frustrate Congress's efforts to limit federal jurisdiction and to eliminate unnecessary or imprudent federal causes of

action. Congress adopted the RICO Amendment at the specific urging of the Securities and Exchange Commission. Through that Amendment, Congress sought to eliminate the abusive use of RICO treble damage remedies that distort investors' existing remedies under the federal securities laws. The decision of the court of appeals here, and of other federal courts in similar cases, will permit those abuses to continue, notwithstanding Congress's clear intent to remit investors to their rights and remedies under the securities laws. Given the potentially expansive reach of the statute of limitations applicable to civil RICO claims, it may be years before Congress's reform of RICO is fully effective.

This case, and the need for interpretation of the RICO Amendment and Congress's intent in adopting the Reform Act, provide a particularly apt setting for articulation of retroactivity jurisprudence in the "ousting" or "destroying" context. This Court's retroactivity jurisprudence as it applies to "jurisdiction-ousting" statutes is a question of federal law as to which further development in the lower courts will not provide assistance. This recurring issue is unlike one of substantive law or procedural change as to which further percolation in the courts of appeals may be useful. Unless resolved, more confusion will occur as courts speculate as to what this Court will say, and judicial resources will be wasted on claims which have no jurisdictional foundation or statutory basis.

Petitioners urge the Court to clarify that, where Congress withdraws federal jurisdiction without reservation, pending claims are no longer cognizable in federal court,

regardless of whether the withdrawing statute also abolishes the underlying cause of action.

I. THE COURT'S CONCLUSION THAT THE RICO AMENDMENT DOES NOT APPLY TO PENDING CASES CONFLICTS WITH THIS COURT'S TEACHING THAT JURISDICTION-OUSTING STATUTES APPLY TO PENDING CASES

In recent years, this Court has decided three cases addressing whether newly-enacted federal statutes apply to cases pending when the statute became law. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S. Ct. 1871 (1997); and *Lindh v. Murphy*, 117 S. Ct. 2059 (1997). Because none of those cases construed a jurisdiction-ousting statute, lower courts applying those decisions to the RICO Amendment have ignored the long-standing principle that statutes that withdraw the basis for federal jurisdiction apply to all pending cases. The circuit court's decision here exemplifies that error.

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court addressed the "apparent tension" between competing and equally well-established principles concerning the effect of new statutes: the principle that a court must apply the law in effect at the time of its decision and the axiom that retroactivity is not favored in the law. *Id.* at 263-64. The Court announced a two-step analysis for determining the temporal reach of new statutes:

> When a case implicates a federal statute enacted after the events in suit, the court's first

> task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id., 511 U.S. at 280.

In discussing whether statutes have a "retroactive effect," this Court held that a statute is not deemed to "impair rights" merely because it applies to conduct that occurred before its enactment or "upsets expectations based in prior law." *Id.* at 269. Drawing on a century and a half of jurisprudence, the Supreme Court held that a statute "conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed," does not have a "retroactive effect." *Id.* at 274. The Supreme Court reasoned that "[p]resent law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.' " *Id.* at 274 (quoting *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J. concurring)). In short, private parties have no right to have the jurisdiction of the federal courts unaltered.

Landgraf's "retroactive effect" analysis relied on cases that involved intervening statutes that ousted jurisdiction and resulted in dismissal of prior-filed actions for lack of jurisdiction. *See, e.g., Bruner v. United States*, 343 U.S. 112 (1952) (Tucker Act claim dismissed for lack of jurisdiction where intervening statute withdrew district court jurisdiction to hear claim); *Hallowell v. Commons*, 239 U.S. 506 (1916) (suit to establish equitable title of an alleged heir of an Indian allottee dismissed for lack of jurisdiction where intervening statute gave Secretary of Interior sole power to determine legal heirs of Indian descendants); *The Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567 (1870) (suit to recover excessive duties paid dismissed for lack of jurisdiction where intervening statute repealed act on which federal court jurisdiction was based). *See also Landgraf*, 511 U.S. at 274 and cases there cited.[4]

Indeed, jurisdictional statutes have historically been applied to pending cases without regard to their effect on the claims of particular litigants. *See Landgraf*, 511 U.S. at 292-93 (Scalia, J. concurring) ("A jurisdictional rule can

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[4] Justice Scalia's concurring opinion in *Landgraf* cited additional cases where an intervening statute ousted federal court jurisdiction and led to dismissal of a previously-filed case. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868) (appeal of writ of habeas corpus dismissed when intervening statute repealed appellate jurisdiction to review habeas corpus cases); *Merchants' Insurance Co. v. Ritchie*, 72 U.S. (5 Wall.) 541 (1867) (suit to recover excessive duties paid dismissed for lack of jurisdiction where intervening statute repealed the act giving rise to federal court jurisdiction). In light of these cases, Justice Scalia noted the Court's "*consistent practice* of giving immediate effect to statutes that alter a court's jurisdiction." *Landgraf*, 511 U.S. at 292 (emphasis added).

deny a litigant a forum for his claim entirely. . . . Our jurisdiction cases are explained, I think, by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power . . . "). *See also United States v. Kelly*, 97 F. 460 (9th Cir. 1899) (amendment to a jurisdictional statute operates as a repeal of the grant of judicial power with respect to the class of cases affected by the amendment).[5]

In *Hughes*, a unanimous Court ruled that a statute that amended the qui tam provision of the False Claims Act ("FCA"), 31 U.S.C. § 3730, to eliminate a defense, did not apply to pending cases. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S. Ct. 1871 (1997). Applying the *Landgraf* analysis, the Court first noted that Congress did not evidence an intent that the FCA amendment should apply to pending cases. The Court then held that the amendment had a "retroactive effect" because it "essentially creates a new cause of action, not just an increased

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[5] In *Landgraf*, the United States argued that the new compensatory damages were "remedial" and should be presumed to apply to pending cases. *See* Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae Supporting Petitioners at 17. One cannot be sure what position the United States would take where a statute, such as the RICO Amendment, both ousts jurisdiction and eliminates duplicative damage remedies. The logic of its view in *Landgraf* – that an *increase* in damages is remedial and is therefore "presumed" to apply to pending cases – supports Petitioners' view here. The practical effect of the RICO Amendment is to *reduce* damages, *i.e.*, to eliminate treble damages otherwise available under RICO for claims grounded on securities fraud, and to remit plaintiffs to their single damage and other remedies under the securities laws.

likelihood that an existing cause of action will be pursued." *Hughes*, 117 S. Ct. at 1878. Because the amendment had a "retroactive effect," the Court applied the presumption against retroactivity and held that the amendment should not apply to pending cases. *Id.*[6] In doing so, the Court acknowledged – but rejected – respondent's argument that the FCA amendment was jurisdictional and, therefore, was excepted from any presumption against retroactivity under *Landgraf*. The Court held that the FCA amendment, while "phrased in 'jurisdictional terms,' " created a new cause of action, affected substantive rights and was therefore subject to a presumption against retroactivity. *Id.* at 1878. *Hughes* did not address, let alone reverse, this Court's long-standing precedents with respect to jurisdiction-ousting statutes.

One week later, in a 5-4 decision, this Court ruled that a provision of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDP Act"), 28 U.S.C. § 2254(d), that limited the availability of habeas corpus relief, did not apply to pending cases. *Lindh v. Murphy*, 117 S. Ct. 2059 (1997). In reaching that decision, the Court again utilized the *Landgraf* analytical framework, examined Congressional intent using traditional canons of statutory construction and concluded that Congress did not intend to apply this AEDP Act provision to pending cases

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[6] In *Hughes*, the United States argued that the amendment in question was in fact a "jurisdictional" rule and should, therefore, apply to a pending case. Brief of the United States as Amicus Curiae at 14. The logic of the government's position in *Hughes* suggests that the United States would share the Petitioners' view that the RICO Amendment applies to pending cases.

because a new chapter in the Act expressly provided that other provisions did apply to pending cases.

Four Justices dissented in *Lindh*, differing with the majority's conclusion that Congress's intent to apply the AEDP Act amendment to pending cases was clearly established. More importantly for these purposes, in considering the second step of the *Landgraf* analysis, the dissent specifically noted that the Court has "regularly applied statutes ousting jurisdiction to pending litigation" and concluded that the Court's opinion in *Hughes* (which the dissenters had joined) did not alter that result:

> Although in [*Hughes*] we recently rejected a presumption favoring retroactivity for jurisdiction creating statutes . . . nothing in *Hughes* disparaged our longstanding practice of applying jurisdiction-ousting statutes to pending cases.

117 S. Ct. at 2071 n.3. (Rehnquist, C.J. dissenting.)

These three cases provide the broad framework for lower courts to determine whether a new statute applies to pending cases. While each case held that the statute in question did not apply to pending cases, none of these decisions altered the long-standing rule – grounded squarely in the nature of federal judicial authority – that jurisdiction-ousting statutes apply to pending cases, absent clear Congressional direction to the contrary.

In this case, the Third Circuit ignored that fundamental teaching, and it ignored the difference between jurisdiction-*ousting* statutes (like the RICO Amendment) and jurisdiction-*creating* statutes. The court then concluded that the RICO Amendment affected Mathews's "substantive rights," *i.e.*, his ability to bring securities fraud-based

civil RICO claims in either federal or state courts, and that the Amendment, therefore, had a "retroactive effect" and should not bar pending cases. App. A at 20-23.[7] Most critically, the court failed to consider the central reality: the absence of any continuing basis for federal court jurisdiction over Mathews's civil RICO claim.[8]

Section 1964(c) permits plaintiffs to "sue in any appropriate United States district court" for injuries caused by violations of Section 1962. The court of appeals conceded that § 1964(c) is the jurisdictional basis for Mathews's RICO claim. App. A at 16, 20.[9] The RICO

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[7] Federal court jurisdiction may derive from "pure" jurisdictional grants that provide for jurisdiction over claims arising under other statutory provisions (*see, e.g.*, 15 U.S.C. § 77v and 15 U.S.C. § 78aa) and from statutes that both create private remedies and confer jurisdiction over the cause of action in question (*see, e.g.*, 15 U.S.C. § 15(a) and 18 U.S.C. § 1964(c)). The withdrawal of jurisdiction is not a function of the character of the statute in question but rather the nature of the congressional action at issue.

[8] The court of appeals sought to reconcile its holding with its recent holding in *Salazar-Haro v. INS*, 95 F.3d 309 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1842 (1997), which applied an AEDP Act amendment precluding judicial review of certain deportation orders to a pending case. The opinions cannot be reconciled. The AEDP Act amendment considered in *Salazar-Haro* denies any judicial review of a category of orders just as the RICO Amendment denies any federal (or state) forum for securities fraud-based RICO claims.

[9] As did the court of appeals, the district court here recognized that the RICO Amendment is, "in part, a jurisdictional statute." Notwithstanding the withdrawal of jurisdiction effected by the RICO Amendment, that court asserted continued authority to hear the claims alleged. App. C at 13. Conversely, recognizing this Court's holding in *Landgraf*

Amendment, however, restricts that jurisdictional grant.[10] It eliminates the federal courts' power to hear a category of cases: civil RICO claims based on § 1962 violations that are predicated on "any conduct that would have been actionable as fraud in the purchase or sale of securities. . . . " 18 U.S.C. § 1964(c).[11] That is, without question, the nature of Mathews's claim. Accordingly, by limiting the scope of federal jurisdiction under Section 1964(c), the RICO Amendment necessarily ousted the district court's subject matter jurisdiction over Mathews's civil RICO claims. As this Court has recognized for well over a century: "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

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that an intervening statute that affects the propriety of prospective relief is not "retroactive" because injunctive relief operates *in futuro* and no person has a "vested right" in a decree that a trial court may enter in the future, the district court denied Mathews's motion for leave to file the Amended Complaint insofar as that Complaint sought injunctive relief, holding that the RICO Amendment barred pending claims for such relief. *See Landgraf*, 511 U.S. at 273-74 and cases there cited; App. C at 16-19.

[10] More recently, the circuit court has acknowledged that the RICO Amendment altered RICO Section 1964(c) to "exclude jurisdiction" over specified RICO claims. *See In re: John Paul Minarik*, No. 97-8146, 1999 WL 44825, at *9 (3d Cir. Feb. 3, 1999).

[11] The RICO Amendment does not restrict securities fraud-based civil RICO claims brought against "any person that is criminally convicted in connection with the fraud. . . . " 18 U.S.C. § 1964(c). That limited preservation of federal jurisdiction returns civil RICO to its intended focus: racketeering.

The fact that Mathews may not be able to pursue a RICO claim in state court does not establish that the RICO Amendment has an impermissible "retroactive effect" nor can it restore federal court jurisdiction that Congress has withdrawn.

The error of the Third Circuit here – its express intent to exercise a judicial power that Congress has now restricted – is mirrored in the confusion of other courts that have addressed the RICO Amendment. The retroactivity issue in this case has been addressed by other courts with differing results. In *Fujisawa Pharmaceutical Co., Ltd. v. Kapoor*, 115 F.3d 1332 (7th Cir. 1997), the court addressed the effect of the Reform Act on a RICO count filed in a lawsuit that also alleged claims for securities fraud. The court concluded, with little discussion, that the Reform Act did not affect RICO claims brought as part of an action asserting parallel claims under the federal securities law (and therefore "arising under" the securities laws) given the terms of the Applicability Provision. That conclusion, while arguably consistent with the literal terms of the Applicability Provision, leads to an anomaly: pre-Reform Act RICO claims that are joined with claims under the securities laws survive the RICO Amendment while pre-Reform Act RICO claims that are filed without any securities law claims at least impliedly do not. That holding does not support – and arguably rejects – the underlying rationale of the circuit court in this case.[12]

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[12] Conversely, in *SEC v. Fehn*, 97 F.3d 1276 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 59 (1997), the Ninth Circuit held that the SEC Provision should be applied to a pending case. The RICO

Similarly, numerous district courts have considered the application of the RICO Amendment to pending cases with conflicting results. Three courts have dismissed pending RICO claims based on the RICO Amendment. *Reading Wireless Cable Television Partnership v. Steingold*, No. CV-S-95-785 DWH, 1996 WL 741432 (D. Nev. July 30, 1996); *Rowe v. Marietta Corp.*, 955 F. Supp. 836 (W.D. Tenn. 1997); and *Krear v. Malek*, 961 F. Supp. 1065 (E.D. Mich. 1997). Eight district courts, in addition to the district court in this case, have held that the RICO Amendment does not bar pending RICO claims. *District 65 Retirement Trust for Members of the Bureau of Wholesale Sales Reps. v. Prudential Securities, Inc.*, 925 F. Supp. 1551 (N.D. Ga. 1996); *In re Prudential Securities Incorporated Limited Partnerships Litigation*, 930 F. Supp. 68 (S.D.N.Y. 1996); *Bromm v. Premier Capital Investment Corp.*, Case No. 4:95-CV3327 (D. Neb. May 30, 1996); *Baker v. Pfeifer*, 940 F. Supp. 1168 (S.D. Ohio 1996); *Chisum v. Lehman Brothers, Inc.*, Case No. 3:94-CV-0419-H (N.D. Tex. July 11, 1996); *Klein v. Boyd*, Civ. A. No. 95-5410, 1996 WL 675554 (E.D. Pa. Nov. 19, 1996), *aff'd in part, rev'd in part*, No. 97-1143, 97-1261, 1998 WL 55245 (3d Cir. Feb. 12, 1998) (applicability of Reform Act not addressed), *rehearing en banc granted, judgment vacated; Frankford Trust Co. v. Advest, Inc.*, Civ. A. No. 93-329, 1997 U.S. Dist. LEXIS 3441 (E.D. Pa. Jan. 14, 1997) *adopted by* 1997 U.S. Dist. LEXIS 3431 (E.D. Pa. Jan. 29, 1997); and *Johnston v. Kidder, Peabody & Co. Incorporated*, Civ. A. No. 95-1300 (W.D. Pa. Oct. 5, 1998) (adopting Magistrate Judge's Report and Recommendation). *See also*

Amendment and the SEC Provision are both outside the ambit of the Applicability Provision. *See, infra*, at 21-23.

131 Main Street Associates, Inc. v. Manko, No. 93 CIV 800, 1998 U.S. Dist. LEXIS 18289 (S.D.N.Y. Nov. 19, 1998) (the court determined that the RICO Amendment did not apply because defendant was convicted of fraud while also noting that RICO Amendment would not apply since the case was filed prior to passage of Reform Act).

Most recently, a district court has ruled that RICO claims filed *after* passage of the RICO Amendment that assert claims based on conduct occurring *before* the Reform Act was passed are not barred by the RICO Amendment. *Gubitosi v. Zegeye*, 28 F. Supp.2d 298 (E.D. Pa. 1998). Given the extended statute of limitations applicable to civil RICO claims, this holding, if followed by other courts, would negate the impact of the RICO Amendment in cases filed many years into the future. *But see Scott v. Steingold*, No. 97 C 7871, 1998 U.S. Dist. LEXIS 15810 (N.D. Ill. Sept. 30, 1998) (RICO claim filed after passage of Reform Act based on pre-Act conduct barred by RICO Amendment).

Furthermore, the issue of the applicability of jurisdiction-ousting statutes to pending cases has been raised, and is likely to reoccur, in other contexts as Congress addresses the appropriate scope of federal jurisdiction and federal causes of action. *See, e.g., Salazar-Haro v. INS*, 95 F.3d 309 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1842 (1997) (Section 440(a) of AEDP Act withdraws jurisdiction to review certain INS deportation orders and applies to pending cases), and *Sandoval v. Reno*, No. 98-3214, 1999 WL 31489 (3d Cir. Jan. 26, 1999) (discussing Congress's jurisdictional limitations in other provisions of the AEDP Act and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat.

3009 (1996)). In addition, statutes limiting federal court jurisdiction may raise applicability issues in other contexts (*see, e.g.*, Section 806 of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 75 (1996) (limiting jurisdiction over certain claims by prisoners)).

The Court should grant this petition not only to correct the error of the court of appeals but also to provide the further guidance to lower courts concerning the proper application of jurisdiction-ousting statutes – such as the RICO Amendment – to pending cases.

II. THE COURT BELOW MISAPPLIED THIS COURT'S RETROACTIVITY JURISPRUDENCE IN FINDING THAT CONGRESS DID NOT INTEND THE RICO AMENDMENT TO APPLY TO THIS PENDING CASE

The Third Circuit erred in concluding that Congress did not intend to apply the RICO Amendment to pending cases. It did so because it misapplied the analytical framework this Court established in *Landgraf*, and applied in *Hughes* and *Lindh*, substituted its own four-step analysis summarized above and concluded that evidence that Congress intended to apply the RICO Amendment to pending cases did not overcome the "strong presumption" against "retroactive" application. App. A at 33. In fact, Congress's intent to apply the RICO Amendment to all civil RICO claims, including pending cases, is evidenced by the text of the Reform Act, the purpose of the Act and legislative actions that gave shape to that Amendment.

A. APPLICATION OF THE RICO AMENDMENT TO MATHEWS'S CLAIM IS COMPELLED BY THE TEXT OF THE REFORM ACT

Title I of the Reform Act (Reduction of Abusive Litigation) reforms securities litigation in three ways: (1) it adds procedural and substantive requirements to class actions brought under the Securities Laws, Reform Act §§ 101-103, 105-06; 15 U.S.C. §§ 77z-1, 77z-2, 78u-4 and 78u-5(2); (2) through the RICO Amendment, it forecloses federal claims that use civil RICO as an alternate remedy for securities fraud, Reform Act § 107; 18 U.S.C. § 1964(c); and (3) it reaffirms (or restores) the SEC's authority to bring enforcement actions for aiding and abetting securities law violations, an authority that had been called into question by *Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994), Reform Act § 104 ("SEC Provision"); 15 U.S.C. § 78t(f).

The Reform Act, by its plain terms, does not limit the application of the RICO Amendment to subsequently-filed actions. Conversely, the Applicability Provision states that the amendments made by Title I of the Act shall not "affect or apply to any *private action arising under [the federal securities laws]* commenced before and pending on the date of enactment of this Act." Reform Act, § 108 (emphasis added). The Applicability Provision does not so restrict the RICO Amendment (because civil RICO actions do not "arise under" the Securities Laws) nor does it restrict the SEC Provision (because SEC enforcement actions are not "private actions").

By carefully distinguishing between Title I amendments that relate to private actions under the Securities

Laws on the one hand, and those amendments that relate to civil RICO actions and the SEC's enforcement powers on the other, Congress demonstrated that it knew how to restrict the application of specific provisions of the Reform Act to future filed cases and further demonstrated its intent that the RICO Amendment and the SEC Provision should not be so restricted. If Congress had intended to foreclose the application of the RICO Amendment to pending cases, as it did to amendments affecting private actions arising under the Securities Laws, it would have said so.

Moreover, nowhere in Title I did Congress reserve the federal courts' power over pending civil RICO claims grounded on alleged acts of securities fraud. This Court's unbroken precedents, however, require such a clear reservation if Congress's withdrawal of jurisdiction is not to apply to pending cases. *See Bruner v. United States*, 343 U.S. 112, 116-17 (1952) (" '[I]t is equally clear, that where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction'. . . . This rule – that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law – has been adhered to consistently by this Court." (quoting *Merchants' Insurance Co. v. Ritchie*, 72 U.S. (5 Wall.) 541, 544-45 (1867)). Thus, Congress withdrew the basis for federal court jurisdiction over securities fraud-based civil RICO claims; it did not reserve jurisdiction over pending cases; and it restricted the application of other Title I amendments to future-filed cases using language that clearly placed the RICO Amendment beyond

the ambit of that restriction. Those acts amply establish Congress's intent.

B. APPLICATION OF THE RICO AMENDMENT TO MATHEWS'S CLAIM FOSTERS CONGRESS'S PURPOSE TO ELIMINATE DUPLICATIVE REMEDIES FOR VIOLATIONS OF THE SECURITIES LAWS

The Reform Act curbs abuses that had come to dominate private securities litigation, particularly class action securities litigation. Many of the Reform Act's amendments require the parties or the courts to take steps early in a class action brought under the Securities Laws. For example, Sections 101 and 102 of the Reform Act require plaintiffs to file a certain certificate with a class action complaint, establish heightened pleading standards for actions under the 1933 Act and the 1934 Act, set standards for the appointment of lead plaintiffs and their counsel, provide for mandatory stays of discovery during the pendency of dispositive motions and establish a safe harbor for "forward-looking statements." *See, generally,* 15 U.S.C. §§ 77z-1, 77z-2, 78u-4 and 78u-5. Congress's decision to apply these safeguards prospectively is understandable. To do otherwise would require parties to relitigate issues previously addressed in pending cases. *See, e.g., Landgraf,* 511 U.S. at 258-59 ("trials completed before its enactment would need to be retried. . . . ").

The RICO Amendment has a different purpose. That Amendment forecloses the use of civil RICO for claims grounded in securities fraud. As to those claims, Congress has long since provided protection to investors in

this country's securities markets through a comprehensive and well-tailored set of remedies embodied in the 1933 and 1934 Acts, and it has given the SEC and criminal authorities an extensive arsenal of weapons to combat securities fraud. Since the passage of RICO, however, private plaintiffs have routinely used civil RICO, its severe penalties and its extended limitations periods to up the ante in garden-variety claims that might have been brought under the securities laws. Over a decade ago, this Court noted that "RICO is evolving into something quite different from the original conception of its enactors. . . . The 'extraordinary' uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud. . . . " but "its correction must lie with Congress." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 500 (1985).[13]

In the Reform Act, Congress reacted to the courts' long-standing concerns about the breadth of RICO and its abusive uses.[14] In adopting the Reform Act, Congress

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[13] As of 1985, when *Sedima* was decided, 40% of the known RICO cases involved securities fraud claims, while only 9% of the cases involved allegations of conduct traditionally associated with professional criminals. *Sedima*, 473 U.S. at 499, n.16 (citing the Report of Ad Hoc RICO Task Force of the ABA Section of Corporation, Banking and Business Law, 55-56 (1985)).

[14] *See Sedima*, 473 U.S. at 499-500: "Yet this defect – if defect it is – is inherent in the statute as written, and its correction must lie with Congress."; *see also Tabas v. Tabas*, 47 F.3d 1280, 1297 (3d Cir.), *cert. denied*, 515 U.S. 1118 (1995): "We share the Supreme Court's concern over the broad application of the civil RICO statute. We are nonetheless bound by the language of

followed the urging of the Chairman of the SEC who testified that civil RICO should not be allowed to distort the remedies available to disappointed investors under the federal securities laws: "Because the securities laws generally provide adequate remedies for those injured by securities fraud, it is both [un]necessary and unfair to expose defendants in securities cases to the threat of treble damages and other extraordinary remedies provided by RICO." Joint Explanatory Statement of the Committee of Conference in H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. (Nov. 28, 1995) at 47, *reprinted in* 1995 U.S.C.C.A.N. 730, 746 (quoting SEC Chair Arthur Levitt).[15] The need for the RICO Amendment was stated, in similar terms, by its sponsor, Congressman Cox:

> [A]lmost everyone who has studied this issue recognizes that plaintiffs' attorneys have used the civil RICO statute to distort the incentives and remedies that the federal securities laws provide. They have done this by taking advantage of a loophole in RICO that has permitted inclusion of securities law violations as a predicate act for which a defendant may be tagged as a racketeer and held liable for treble damages and attorneys' fees.

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the statute and the Supreme Court's interpretation of it. Accordingly, it is for Congress to decide whether to narrow the scope of RICO. . . ."

[15] The SEC had urged abolition since 1991. *See* testimony of Mary L. Schapiro, Commissioner, Securities and Exchange Commission, Concerning H.R. 1717, the RICO Amendments Act of 1991, Before the Subcommittee on Intellectual Property and Judiciary Administration, Judiciary Committee, U.S. House of Representatives (April 25, 1991).

141 Cong. Rec. H2772 (daily ed. March 7, 1995). Congress addressed this distortion of remedies under the Securities Laws by adopting the RICO Amendment. Indeed, it would be anomalous in the extreme if an abusive use of civil RICO that resulted from a "loophole" that Congress has now plainly plugged was allowed to proceed only because the abusive action was filed before the Reform Act was adopted.

Congress's purpose would be thwarted if the RICO Amendment was limited to cases filed after December 1995. That frustration of congressional purposes is demonstrated here. The court of appeals would permit Mathews to pursue stale securities claims, dressed in the clothes of RICO and filed almost a decade *after* those claims would have been barred by the statute of repose applicable to claims under the 1934 Act. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991).[16] Moreover, as demonstrated above, lower court

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[16] The Third Circuit's suggestion that civil RICO has a deterrent value that is removed by the RICO Amendment simply substitutes that court's view of wise policies for the contrary decision of Congress: "The primary conduct of the parties will certainly be affected now that defendants like Kidder, Peabody no longer find themselves subject to RICO's treble damages liability or its longer statute of limitations." App. A at 25 n.17. That suggestion is also entirely fanciful. First, "defendants like Kidder, Peabody," *i.e.*, broker-dealers in securities, are subject to extensive regulation by the SEC, the National Association of Securities Dealers and the Stock Exchanges. Securities fraud can result in serious disciplinary sanctions, including revocation of the license to be in the securities business in the United States, and civil and criminal prosecutions. Actions against persons in the securities business have resulted in disgorgement of illegal profits and single

decisions that would permit *post*-Reform Act claims grounded on *pre*-Reform Act conduct to proceed would compound and prolong this frustration of congressional purpose. *See, supra,* at 18-19.

C. CONGRESS'S INTENT TO APPLY THE RICO AMENDMENT TO PENDING CASES IS DEMONSTRATED BY THE LEGISLATIVE STEPS THAT GAVE SHAPE TO THAT AMENDMENT

The Reform Act was fashioned from two companion bills, H.R. 1058 ("House Bill") and S.240 ("Senate Bill"). The House Bill, as originally drawn, did not amend RICO, and it did not contain the SEC Provision. It did, however, have a general applicability provision which stated: "This Act and the amendments made by this Act are effective on the date of enactment of this Act and shall apply to cases commenced after such date of enactment." 141 Cong. Rec. H2770 (daily ed. March 7, 1995). The Senate Bill, as originally drawn, amended Section 1964(c) of RICO but did not have an applicability provision. 141 Cong. Rec. S1076-8 (daily ed. Jan. 18, 1995).

The House Bill was later amended to add a RICO provision that was identical to the Senate's RICO amendment, but the House Bill's general applicability provision was not amended. 141 Cong. Rec. H2770 (daily ed. March

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damages in hundreds of millions of dollars. Finally, contrary to the court's view of the deterrent effect of civil RICO, the SEC, a vigorous enforcer of the antifraud provision of the securities laws and a supporter of meritorious private actions under those laws, for many years has supported the abolition of securities-based civil RICO actions, viewing them as coercive and abusive.

7, 1995). Thus, the amended House Bill would have restricted application of that RICO amendment to subsequently-filed actions. This version of the House Bill was approved and referred to the Senate Banking, Housing and Urban Affairs Committee ("Senate Committee"). *See* H.R. 1058, 104th Cong. (March 10, 1995). The Senate Committee then modified the Senate Bill's existing RICO amendment; added the SEC Provision; and added an applicability provision that essentially tracks Section 108 of the Reform Act. 141 Cong. Rec. S8889-90 (daily ed. June 22, 1995). Unlike its House counterpart, the Senate Bill's applicability provision did not restrict the RICO Amendment (or the SEC Provision) to future filed cases.

Thus, the Senate Committee had the choice of (1) using the general applicability provision of the original House Bill that gave prospective application to all amendments, or (2) adding a provision to the Senate Bill that would give prospective application to those specific Title I amendments that Congress wanted to restrict to subsequently-filed actions. The Senate Committee chose the latter option, deliberately identifying those provisions of Title I of the Reform Act that should apply prospectively and those provisions that should not be so restricted.[17]

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[17] Congress's sequential amendments of the Applicability Provision demonstrate that the Provision did not result by accident. That fact is further demonstrated by Congress's careful attention to the effective dates for other Titles of the Reform Act. Title II of the Reform Act amends the federal securities laws to provide for proportionate liability and establish a standard of liability for outside directors. Reform Act § 201, 15 U.S.C. § 78u-4. Title III of the Reform Act amends the

In *Lindh*, this Court held that courts must look at a statute's text and its legislative history to determine congressional intent and, in doing so, should use traditional methods of statutory interpretation to determine a statute's temporal reach. *Lindh*, 117 S. Ct. at 2062. The Third Circuit, however, concluded that, under *Lindh*, statutory construction rules may be used to justify the prospective application of a statute but not to discern Congress's intent that a statute should apply retroactively. App. A at 28. Nothing in *Lindh* (or *Landgraf*) supports this conclusion. Statutory construction rules are commonly used to determine congressional intent, but they are content neutral. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). No basis exists for holding that a rule of statutory construction can be used to discern an intent to apply a statute prospectively but cannot be used to discern an intent to apply a statute retroactively.

Thus, having failed to give effect to the jurisdiction-ousting nature of the RICO Amendment, the court of appeals also misapplied this Court's standards for determining congressional intent. In doing so, the court ignored conclusive evidence that Congress intended the

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1934 Act to require the disclosure of corporate fraud by auditors. *Id.* § 301, 15 U.S.C. § 78j-1. Each Title has its own applicability provision. Each such provision was tailored by Congress to express precisely what provisions should apply to specific conduct. *See id.* § 202 and § 301(b), 15 U.S.C. § 78j-1 note.

RICO Amendment to bar pending actions. That error results in two anomalies: the federal courts' continued adjudication of a claim for which there is no longer a jurisdictional predicate, and federal enforcement of a cause of action that Congress has expressly abolished. This Court's review of that decision is warranted to address those anomalies and to provide further guidance to the lower courts on the important issues embedded in this appeal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: February 16, 1999

APPENDIX A

John W. MATHEWS; Carole Ann Nuckton; Patricia Lester; Jordan Brodsky; Thomas C. Chestney; Deborah W. Troemner; William J. Waterman, Jr.; Vernon L. Schatz; Melvin H. Roots; Robert J. Holton; James J. Boyle; David L. Robinson; Vincent J. Panepinto; Dominic A. Martell; Francis B. Borcato; John J. Dougherty, Trustees of the Operative Plasterers & Cement Masons Local Union Officer & Employee Pension Fund; Lee Crossman; Susanne Diane Anderson; Larry C. Anderson; George P. Arnold; Ann M. Arnold; Donald J. Aibel, on behalf of themselves and all others similarly situated,

v.

KIDDER, PEABODY & CO., INC., a Delaware corporation; KP Realty Advisers, a Delaware corporation; HSM, Inc., a Texas corporation; Henry S. Miller Co., Henry S. Miller Management; Henry S. Miller Appraisal Corporation; HSM Real Estate Securities Corporation; Miller Real Estate Services Corporation, a Texas corporation, Appellants.

No. 97-3164.

United States Court of Appeals,
Third Circuit.

Argued June 11, 1998.

Decided Nov. 16, 1998.

David A. Brownlee (argued), Kenneth M. Argentieri, Paul E. Del Vecchio, Bethany E. Ammons, Kirkpatrick & Lockhart, LLP, Pittsburgh, PA, for Appellants, Kidder, Peabody & Co., Incorporated and KP Realty Advisers, Inc.

William M. Wycoff, Donald M. Lund, Thorp, Reed & Armstrong, Pittsburgh, PA, for Appellants, HSM, Inc., Henry S. Miller Co., Inc.; Henry S. Miller Management Corporation; Henry S. Miller Appraisal Corporation; HSM Real Estate Securities Corporation and Miller Real Estate Services Corporation.

Anthony P. Picadio (argued), Picadio, McCall, Kane & Norton, Thomas W. Henderson, Tybe A. Brett, Pittsburgh, PA, for Appellees.

Before: BECKER, Chief Judge, and ALDISERT and WEIS, Circuit Judges.

OPINION OF THE COURT

BECKER, Chief Judge.

The Private Securities Litigation Reform Act of 1995 ("Reform Act" or "PSLRA"), amends 18 U.S.C. § 1964(c) to eliminate, as a predicate act for a private cause of action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), any conduct actionable as fraud in the purchase or sale of securities. *See* Pub.L. No. 104-67, § 107, 109 Stat. 737, 758. This civil RICO case was brought by plaintiff John W. Mathews ("Mathews"), a disappointed investor, alleging misconduct – including securities fraud – by several investment houses in connection with the sale of limited partnerships in real

estate. The question presented in this interlocutory appeal by Kidder, Peabody & Co. and the other defendants is whether the relevant portion of the Reform Act (hereinafter the "RICO Amendment") applies retrospectively to eliminate securities fraud-based RICO claims such as the present one, which were pending when Congress enacted the Reform Act. The defendants argue that it does. We hold that it does not.[1]

I. Facts and Procedural History

This action arises out of Mathews's failed investment in one of three related real estate limited partnerships –

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[1] A separate issue briefed and argued by the parties is whether the Reform Act applies to and bars the securities fraud-based RICO claims of certain individuals who were added to plaintiff's original action in his First Amended Complaint *after* Congress enacted the Reform Act. We conclude, however, that the issue is not properly before us in this interlocutory appeal. Our jurisdiction pursuant to 28 U.S.C. § 1292(b) is limited to the certified order; we do not have authority to review other orders that may have been entered in the case. *See United States v. Stanley*, 483 U.S. 669, 676-77, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987). Since to determine this issue we would have to decide whether the original plaintiff had standing to represent the new classes of plaintiffs added in the First Amended Complaint and whether the district court properly granted Mathews's class certification motion – two issues that were not included in or subsumed by the certified order – we are barred from reviewing it. While we may reach other issues not before us when necessary "[t]o give full effect to the appellants' right to review," *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 624 (3d Cir.1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), we can fully review the issue decided in the certified order without reaching these other issues.

KP/Miller Realty Growth Fund I, L.P. ("Fund I"); KP/Miller Realty Growth Fund II, L.P. ("Fund II"); and KP/Miller Realty Growth Fund III, L.P. ("Fund III") – organized, marketed, and managed by the defendants in the 1980s.[2] On June 7, 1984, Mathews purchased 40 units of Fund II from the defendants for $500 per unit, representing a total investment of $20,000. Almost eleven years later, on January 23, 1995, Mathews filed a class action complaint against the defendants to recover his losses and the losses of a putative class of persons who purchased partnership units in all three Funds. The complaint asserted federal RICO claims and state claims for breach of fiduciary duty and negligent misrepresentation.

Mathews alleges that the defendants organized the Funds for the purported purpose of making sound investments in commercial real estate projects in the United States, but that the true purpose of the Funds, and the object of the defendants' fraudulent scheme, was to generate excessive fees and income for the defendants who sponsored the Funds. Mathews further alleges that the defendants engaged in the predicate acts of securities fraud, mail fraud, and wire fraud in the organization,

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[2] There are two groups of related defendants. The "Kidder Defendants" include Kidder, Peabody & Co. Inc., the principal distributor for the KP/Miller Funds offerings and the corporate parent of KP Realty Advisers, Inc.; and KP Realty Advisers, Inc., a corporate general partner of the KP/Miller Funds. The second group, the "Miller Defendants," include Miller Real Estate Services Corp., a corporate general partner of the KP/Miller Funds; HSM, Inc.; Henry S. Miller Co.; Henry S. Miller Management Corp.; Henry S. Miller Appraisal Corp.; and HSM Real Estate Securities Corp. Collectively, we refer to these entities as the "defendants."

marketing, and management of these Funds and that this constituted a cognizable pattern of racketeering activity.[3] The factual predicates for Mathews's theory are as follows.

First, he alleges that Kidder, using interstate wire communications, advised its retail brokers in branch offices around the country that units in the Funds were available for sale, but (mis)represented that they were safe, nonspeculative investments, suitable for customers with conservative investment objectives and a low tolerance for risk. Further, in light of Kidder's characterization of the Funds, the brokers between 1982 and 1986 made an "oral uniform sales pitch" to more than 6,000 potential investors in the Funds, who purchased units in the Funds in reliance on these misrepresentations. Mathews alleges that defendants "concealed the true value of the investments" and "deliberately misrepresented the value of these investments on monthly account statements" that were mailed to investors. These misrepresentations allegedly continued until February 1, 1994, when Kidder purportedly sent account statements to investors that, for the first time, "alerted investors that the value of the KP-Miller partnerships may have depreciated."

Mathews asserted RICO claims with respect to all three Funds, although he had only invested in Fund II, seeking to represent "a class of persons which includes

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[3] Our conclusions regarding Mathews's securities fraud-based RICO claims apply to his mail and wire fraud-based claims, as the latter "are based on conduct that would have been actionable as securities fraud." H.R. Conf. Rep. No. 104-369, at 47 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 746.

all persons residing in the United States who purchased partnership units in KP/Miller Realty Growth Funds I, II, and III in the initial offering of such securities." The defendants moved to dismiss the complaint, contending, *inter alia*, that Mathews had no standing to assert claims as to Funds I and III in which he had never invested, and that his claims were barred by the statutes of limitations applicable to securities claims and RICO claims. On December 19, 1995, the district court held that Mathews could pursue his claims with respect to Fund II, but dismissed his individual claims with respect to Funds I and III, concluding that Mathews lacked standing to bring them. *See* Dist. Ct. Op. & Order (Dec. 19, 1995) at 13-16. The court reserved judgment on whether Mathews could serve as a class representative for the class of persons who invested in all three of the Funds. *See id.* at 13-14 n. 4.

Three days after this Order, on December 22, 1995, the Reform Act became law when the Senate overrode President Clinton's veto. *See* 141 Cong. Rec. S19180 (daily ed. Dec. 22, 1995). As noted above, the Act forecloses civil RICO claims that are based upon conduct that would have been actionable as securities fraud. *See* Pub.L. No. 104-67, § 107, 109 Stat. 737, 758 (1995) (amending 18 U.S.C. § 1964(c) (1994)). After passage of the Act and the district court's dismissal of Mathews's individual Funds I- and III-based causes of action, Mathews sought leave to file a First Amended Class Action Complaint. He sought to add twelve new plaintiffs who had invested in Funds I or III, or both. The defendants opposed the motion on the ground that the Reform Act should apply retrospectively to Mathews's action.

That same day, Mathews moved for class action determination, requesting certification of a class embracing investors in Funds I, II, and III, and designation of Mathews as class representative. The defendants opposed the Class Certification Motion arguing, *inter alia*, that Mathews could not satisfy the typicality requirement of Rule 23(a): (1) with respect to a class of investors in Funds I and III since he had no standing to pursue such claims, and (2) because he was subject to particularized defenses on his Fund II claims since he had transferred his Fund II investment out of Kidder in May 1987 and had not received the account statements that he claimed were the basis for the alleged misrepresentations underlying his RICO claim. In addition, defendants contended that Mathews could not satisfy the predominance requirement of Rule 23(b)(3) because his RICO claims were grounded on oral representations by a multitude of brokers that would require highly individualized showings of broker representations and customer reliance.

The district court rejected most of defendants' arguments and granted both of Mathews's motions. First, in an unpublished opinion and order, the court granted the Class Certification Motion, concluding that Mathews had met his burden of establishing the requirements of Rule 23 for class certification. *See Mathews v. Kidder, Peabody & Co.*, No. 95-85, 1996 WL 665729, at *5 (W.D.Pa. Sept.26, 1996). Simultaneously, the court filed an opinion in which it held that the Reform Act did not retrospectively bar Mathews's previously filed RICO claims that otherwise would be proscribed under the amended RICO Act. *See Mathews v. Kidder, Peabody & Co.*, 947 F.Supp. 180, 185-86 (W.D.Pa.1996). The court also ruled that Mathews could

file the Proposed First Amended Complaint adding the new plaintiffs, because the class-action RICO claims relating to Funds I and III had not previously been dismissed and were likewise not barred by the Reform Act. *See id.* at 187-89.

Recognizing that the defendants' position on the retrospective application of the Reform Act presented a serious issue, the district court certified an interlocutory appeal from the opinion and order, regarding the application of the Reform Act to this case. *See* Dist. Ct. Modified Order (Jan. 22, 1997). We granted defendants' petition for permission to appeal. *See* 28 U.S.C. § 1292(b).

II. Retrospective Application of Statutes Under *Landgraf* and *Lindh*

The defendants contend that the district court erred when it refused to apply the Reform Act retrospectively to bar Mathews's pending RICO claims, which were based upon allegations of securities fraud. The relevant section of the Reform Act, section 107, provides that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of [RICO]." Defendants base their argument on a reading of *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), and *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), the preeminent recent cases addressing the retrospective application of statutes.

A. *Landgraf*

In *Landgraf*, the Court set out a two-step analysis for considering the temporal reach of new federal statutes:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 511 U.S. at 280, 114 S.Ct. 1483. Under the two-step analysis, a court must first ask a threshold question: has Congress expressly provided that the statute in question should or should not apply retrospectively? If the answer to this question is "yes," then we follow Congress' express prescription and apply the statute accordingly.[4] If the answer to this question is "no," then we move on to the second step in the analysis.

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[4] Of course, a court may not follow an express command to apply a statute to pending cases if to do so would violate a constitutional proscription, such as those found in the Ex Post Facto or Due Process Clauses.

The second step requires us to ask whether the statute has a "retroactive effect."[5] If the answer to this question is "yes," there is a traditional, strong presumption against retrospective application. Thus, we ask a subsidiary question: Is there a "clear congressional intent" to apply the statute retrospectively? If the answer to this question is "yes," then Congress's clear intent trumps the default presumption, and we apply the statute retrospectively. Otherwise, if this clear intent to apply the statute retrospectively is absent, the default rule applies, and we do not apply the statute retrospectively. If, on the other hand, the answer to the second question – does the statute have "retroactive effect"? – is "no," courts are to use normal rules of statutory construction along with traditional methods of determining a statute's temporal reach to establish whether a statute is to be applied retrospectively.[6]

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[5] "Retroactive effect" refers not to a statute's temporal reach – which is the ultimate question to be answered in these cases – but to the effect the statute would have if applied retrospectively; i.e., would it reach back in time and alter the rights or obligations on which the parties relied prior to the statute's passage? If so, the statute is said to have "retroactive effect" and, as discussed in the text, its application to pending cases is disfavored. To minimize confusion, we refer to a statute that applies to pending cases as one with "retrospective" application.

[6] Although it was not necessary for the Court in *Landgraf* to reach this final point in the analysis – for it found that the provisions involved had a retroactive effect – language in *Landgraf* and later cases, discussed below in the text, make clear that a statute without retroactive effect and without an express temporal command are subject to normal rules of statutory construction.

B. *Lindh*

In 1997, the Supreme Court added a new twist to the *Landgraf* two-part analysis:

> In determining whether a statute's terms would produce a retroactive effect, however, and in determining a statute's temporal reach generally, our normal rules of construction apply. Although *Landgraf's* default rule would deny application when a retroactive effect would otherwise result, *other construction rules may apply to remove even the possibility of retroactivity*. . . .

Lindh, 117 S.Ct. at 2063 (emphasis added). This language reforms the two-part analysis we sketched above, essentially adding a step. *Lindh* directs us to ask an additional threshold question before we move to the question of whether the statute has a retroactive effect. Under *Lindh's* modification to the *Landgraf* two-part inquiry, the analysis is as follows: First, we ask the same threshold question: did Congress expressly prescribe the statute's temporal reach? Of course, if the answer to this question is "yes," then we follow Congress's express prescription and apply the statute accordingly. However, if the answer is "no," then we ask another threshold question before moving to the "retroactive effect" inquiry – do the normal rules of statutory construction apply in such a way as to remove the possibility of retroactivity?

In *Lindh*, the Court used a negative inference to infer that Congress did not intend to apply retrospectively certain parts of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Lindh*, 117 S.Ct. at

2063-64. Thus, the Supreme Court held that if a congressional intent to *not* apply a statute retrospectively can be discerned, then the courts are to follow that intent, without regard to whether the statute has "retroactive effect." Underlying this new step in the analysis was the traditional presumption against retroactivity. *See Lindh*, 117 S.Ct. at 2062; *see also Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871, 1876, 138 L.Ed.2d 135 (1997).

C. The *Landgraf/Lindh* Framework

The resulting *Landgraf/Lindh* analysis can be summarized as follows:

> 1. First, we must look for an "unambiguous directive," *Landgraf*, 511 U.S. at 263, 114 S.Ct. 1483, from Congress as to the temporal reach of a statute. If one is found, we must follow it and our inquiry is done.
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> 2. In the absence of a clear statement from Congress, we must use normal statutory construction rules to determine if Congress manifested an intent to only apply a statute to future cases. Again, if we find an intent to not apply a statute retrospectively, our inquiry is done.[7]

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[7] One might ask why this quest for congressional intent only applies one way: We look for an intent to apply a statute prospectively, but not an intent to apply one retrospectively. While this may seem illogical, the reason becomes apparent in the next step. If the statute is found to have a "retroactive effect," it can be applied retrospectively only if Congress has expressed a *clear* intent to do so – because of the strong presumption against applying statutes retrospectively.

3. If neither an express command in either direction nor an intent to apply a statute prospectively is found, we look at the effect that the statute will have. Does it have "retroactive effect," i.e., does it "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed"? *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483. Or, conversely, does the statute affect only prospective relief, or change procedural rules,[8] or simply allocate jurisdiction among fora?

a. If the statute does *not* have retroactive effect, we apply the usual statutory construction rules to determine whether it should be applied to pending cases.

b. However, if the statute does have retroactive effect, we employ the strong presumption against applying a statute with retroactive effect to pending cases: At this point, only Congress's *clear* intent to apply

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Therefore, at the second step, it would serve no purpose to search for congressional intent to apply the statute retrospectively; if such an intent were found, we would still need to examine the statute for a retroactive effect and – if such an effect were found – only Congress's *clear* intent would be sufficient to apply the statute retrospectively.

[8] However, as the Court noted in *Landgraf*, even procedural rules are subject to the presumption against retroactivity in a case in which the procedures affected have already transpired (e.g., the filing of a complaint in a pending case, evidentiary rulings in a case in which trial has been completed). *See Landgraf*, 511 U.S. at 275 n. 29, 114 S.Ct. 1483.

the statute retrospectively will overcome the presumption.[9]

More succinctly, then, we (1) look for an express command in either direction; (2) discern whether there is congressional intent to only apply a statute prospectively; (3) analyze the statute for retroactive effect; and (4) look for clear intent to apply the statute retrospectively (if it has a retroactive effect) or simply use normal rules of construction to determine the statute's temporal reach. Now that we have sketched the *Landgraf/Lindh* framework for retrospective application of statutes, we must apply it to this case.

III. Application of *Landgraf/Lindh*

A. Express Command

First, we ask whether Congress has expressly prescribed the temporal reach of the statute. Mathews makes a not-very-convincing argument that Congress has spoken expressly on the temporal reach of the RICO Amendment and that it is only to apply prospectively. He bases this contention on the language in section 108 of the Reform Act (the "Applicability Provision"). The Applicability Provision directs that "[t]he amendments made

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[9] *See, e.g., Landgraf*, 511 U.S. at 270, 114 S.Ct. 1483 ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent."); *id.* at 268, 114 S.Ct. 1483 ("[A] requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.").

by this title shall not affect or apply to any private action arising under title I of the Securities Exchange Act of 1934 or title I of the Securities Act of 1933, commenced before and pending on the date of enactment of this Act." Pub.L. No. 104-67, § 108, 109 Stat. 737, 758 (1995).[10] Mathews submits that his RICO claims "arise under" the securities laws because these laws are an "essential element" of his claims and the outcome depends upon their interpretation and/or application. This argument is a flawed attempt to analogize to one aspect of the well-pleaded complaint rule. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) ("Even though state law creates appellant's causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties."). Mathews in effect argues that, while RICO creates his cause of action, this is a case "arising under" the securities laws (for purposes of the Applicability Provision) because his right to relief requires resolution of substantial questions of the securities laws.

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[10] The "amendments made by this title," referred to in the Applicability Provision, include: (1) new procedural and substantive provisions that apply to private actions under the 1933 and 1934 Acts; (2) a reaffirmation (or restoration) of the SEC's authority to bring aiding-and-abetting claims under the securities laws; and (3) foreclosure of civil RICO claims that rely on conduct that would have been actionable under the federal securities laws.

Contrary to Mathews's submission, we find that his claims arise under RICO, as that is the federal cause of action Mathews alleges. *See American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S.Ct. 585, 60 L.Ed. 987 (1916) ("A suit arises under the law that creates the cause of action."). Indeed, in his own complaint, Mathews alleges that his claims arise under RICO, not the securities laws, and he bases federal jurisdiction on the RICO statute. Thus, there is no express prescription in the statute directing application of the RICO Amendment prospectively or retrospectively.[11]

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[11] In support of his argument, Mathews cites *Fujisawa Pharmaceutical Co. v. Kapoor*, 115 F.3d 1332 (7th Cir.1997), arguing that the Seventh Circuit "held that the right to maintain a pending RICO case was preserved by Section 108 where the claim was based on securities acts violations." Appellees' Br. at 7. This, however, was not the holding in *Fujisawa*. Rather, the court held that the Applicability Provision in section 108 preserves RICO claims that are "part of an action brought under the securities laws *as well*." *Fujisawa*, 115 F.3d at 1338 (emphasis added). In *Fujisawa*, as here, plaintiff's securities-law claims were time-barred. Yet, in *Fujisawa*, plaintiff pled these claims, only to have them dismissed as time-barred by the district court (a dismissal which the court of appeals affirmed). Therefore, Fujisawa's RICO claims were "part of an action brought under the securities laws as well." While we express doubt regarding the soundness of the holding in *Fujisawa* – allowing RICO claims to fall under the Applicability Provision only by piggybacking on time barred securities-law claims – we need not reach this issue, as Mathews pled no pure (non-RICO) federal securities-law claims.

B. Intent to Apply Prospectively

The second step under the *Landgraf/Lindh* analysis is to examine a statute under normal rules of statutory construction for evidence of congressional intent to apply the statute prospectively only.[12] This is the step that the Court added in *Lindh*. We only reach this stage if Congress has not provided us with an "express command"; we need not bother with the next stage – analysis of whether the statute has retroactive effect – if an intent to apply the statute prospectively can be found. Therefore, using normal rules of statutory construction, we must look for an intent to apply a statute prospectively only.

Here, we find no such intent. Neither the negative inference at work in *Lindh* nor legislative history expressing an intent to apply the RICO Amendment only to new cases can be found. Indeed, as we discuss below, there is a dearth of discussion on the Applicability Provision in the statutory record. The text of the Provision also provides no clues, mentioning only private actions arising under the 1933 and 1934 Securities Acts.[13] Therefore, we

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[12] An argument can be made – and is made by the defendants – that congressional intent to apply the RICO Amendment retrospectively can be discerned. While we find no such intent in the statute or legislative history, *see infra* Part III.D, we emphasize that, at this stage of the retroactivity analysis, we are only searching for intent to apply the statute *prospectively*.

[13] As noted *supra* Part III.A, we find unpersuasive plaintiff's argument that his RICO claim is covered by the Applicability Provision's reference to the 1933 and 1934 Acts, as the securities-based RICO claim depends on an interpretation of those acts for its disposition. We find the text of the

must turn to the next step in the analysis, examination of the statute for retroactive effect.

C. Retroactive Effect

Defendants argue that the RICO Amendment does not have a retroactive effect, but is simply a jurisdictional statute. They also argue that, even if the Amendment does have a retroactive effect, Congress has clearly expressed its intent to have the Amendment apply to pending cases, thereby eliminating plaintiff's RICO claims. We conclude that the Amendment does have a retroactive effect and we find no clear congressional intent to apply the Amendment retrospectively.

1.

A statute is deemed to have retroactive effect if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483. Defendants admit that, in a sense, retrospective application of the statute would impair some rights that Mathews had, for prior to the passage of the Act, he had a RICO cause of action based upon defendants' alleged actions, but afterward he would not. Nevertheless, they argue that the Amendment here simply altered a jurisdictional statute,

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Applicability Provision both inapplicable to Mathews's RICO claim and unhelpful in resolving the question of whether Congress intended the RICO Amendment to have only prospective application.

18 U.S.C. § 1964(c). Specifically, § 1964(c) permits plaintiffs to "sue . . . in any appropriate United States district court" for injuries caused by violations of RICO. The RICO Amendment qualifies this language in § 1964(c) by excluding RICO claims predicated on "any conduct that would have been actionable as fraud in the purchase or sale of securities."

Defendants point out that courts "have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf*, 511 U.S. at 274, 114 S.Ct. 1483. For, as the Court in *Landgraf* explained, "[a]pplication of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.' " *Id.* (citations omitted). Applying these precepts from *Landgraf*, defendants argue that the RICO Amendment "ousts jurisdiction" of the district court to hear a securities-based RICO case, and that it therefore does not have a retroactive effect, requiring dismissal of this action.

While § 1964(c) is phrased in federal jurisdictional terms, the Supreme Court has interpreted the RICO statute as providing for concurrent state jurisdiction over RICO actions. *See Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990).[14] Therefore, an amendment

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[14] Given that this case originated in federal court, we need not decide whether the RICO Amendment ousts *state* courts as

to § 1964(c), while literally addressed to the jurisdiction of the federal courts, would appear to affect all securities fraud-based RICO claims. Apparently, no tribunal retains the authority to hear a RICO case predicated on securities fraud; rather, the "substantive right" to bring such a case in both state and federal court is affected by the RICO Amendment. The Amendment therefore is not like the portion of the AEDPA addressed in *Salazar-Haro v. INS*, 95 F.3d 309 (3d Cir.1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1842, 137 L.Ed.2d 1046 (1997), which fell within the traditional category of jurisdictional provisions in explicitly precluding review within particular fora of certain deportation orders. *See id.* at 310.

It is clear from the legislative history that the intention behind the RICO Amendment was "to address a significant number of frivolous actions based on alleged securities law violations." 141 Cong. Rec. H2771 (daily ed. Mar. 7, 1995) (statement of Rep. Cox); *see also* H.R. Conf. Rep. No. 104-369, at 47 (1995), *reprinted in* 1995

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well of their jurisdiction to hear securities fraud-based RICO claims. We note in passing, however, that if the amended section of the RICO statute, § 1964(c), is the source of state court jurisdiction, it is doubtful whether the RICO Amendment affects only federal jurisdiction rather than all securities fraud-based RICO claims. In fact, the sponsor of the RICO Amendment in the House argued for its adoption on the ground that, without it, "attorneys could then do an end run around all of the [securities-law] reform by simply using the RICO statute." 141 Cong. Rec. H2771 (daily ed. Mar. 7, 1995) (statement of Rep. Cox). If the Amendment was aimed only at ousting federal court jurisdiction, this argument would have little force, as attorneys could still do "an end run" around the Act's reforms simply by filing RICO cases in state court.

U.S.C.C.A.N. 730, 746 ("The [Conference] Committee intends this amendment to eliminate securities fraud as a predicate offense in a civil RICO action."). There is no discussion in the minimal attention given to the RICO Amendment of either "jurisdictional" matters or even the "power" of the federal courts to hear a particular type of claim. Rather, focus was clearly on the substance of claims such as the present one and on completely eliminating the so-called "treble damage blunderbuss of RICO," 141 Cong. Rec. H2771 (daily ed. Mar. 7, 1995) (statement of Rep. Cox), in securities fraud cases.

Other courts have held that retrospective application of the RICO Amendment does not "impair rights a party possessed when he acted," because "a plaintiff's right to recover for securities fraud under RICO was an unintended situation." *Krear v. Malek*, 961 F.Supp. 1065, 1073 (E.D.Mich.1997).[15] We find this argument unpersuasive. First, whether or not a particular cause of action was created intentionally, its subsequent elimination still impairs rights that existed after the cause of action was

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[15] The courts in both *Krear* and *Rowe v. Marietta Corp.*, 955 F.Supp. 836 (W.D.Tenn.1997), based their determination that retrospective application of the RICO Amendment would not impair plaintiffs' rights at least in part on the ground that the plaintiffs in those cases retained viable securities-law claims after the RICO claims were dismissed. *See Krear*, 961 F.Supp. at 1074; *Rowe*, 955 F.Supp. at 846-47. We question whether it is appropriate to determine the temporal reach of the RICO Amendment on a case-by-case basis, based on the existence (or lack thereof) of non-RICO claims in plaintiff's case. Nonetheless, we note that the reasoning of the *Krear* and *Rowe* courts is inapplicable in this case, as Mathews's cause of action includes only RICO claims.

recognized. Further, racketeering activity in the RICO statute is defined to include "fraud in the sale of securities," 18 U.S.C. § 1961(1)(D) (1994), calling into question the notion that securities-based RICO claims were unintended.[16]

We find further support for our conclusion that the RICO Amendment has retroactive effect in a different formulation of this issue in *Landgraf*. The Court said that a statute has retroactive effect if it "attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270, 114 S.Ct. 1483. In this case, the events in question are the alleged fraudulent acts by the defendants. If the RICO Amendment is applied to this case, it would attach new legal consequences to these events. Before the Amendment, the legal consequences included liability under the federal securities laws and RICO; after the Amendment, the legal consequences included liability only under the securities laws. *Cf. Armbruster v. Unisys Corp.*, 32 F.3d 768, 771 n. 3 (3d Cir.1994) (noting that clear congressional intent is required to apply a statute retrospectively if doing so "altered the extent of a party's liability").

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[16] We express no opinion about the argument that Congress never intended civil litigants to be able to avoid the specific procedural and substantive provisions of the federal securities laws (including the limitations on damages) by using the RICO statute and its treble damages provision. We simply take issue with the *Krear* court's assertion that securities fraud-based RICO claims were themselves wholly unintended and its conclusion therefrom that eliminating such claims destroys no rights.

The Court's ultimate decision in *Landgraf* is also instructive. The Court found that applying the particular amendment to Title VII that was at issue there would have retroactive effect. That amendment, creating a right to compensatory and punitive damages (where only back pay had been previously available), "can be seen as creating a new cause of action, and its impact on parties' rights is especially pronounced." *Landgraf*, 511 U.S. at 283, 114 S.Ct. 1483. If a change in the law from back pay to compensatory and punitive damages is seen as *creating* a new cause of action and impairing a party's rights, certainly a change from treble damages (under RICO) to compensatory damages alone (under the securities laws) may be seen as *destroying* a cause of action and impairing a party's rights. The Court also noted that it had "not classified a statute introducing damages liability as the sort of 'remedial' change that should presumptively apply in pending cases." *Id.* at 285 n. 37, 114 S.Ct. 1483. We find it unlikely, then, that the Court would classify a statute eliminating damages liability as one that should presumptively apply to pending cases.

2.

The Supreme Court's unanimous decision in a case in which it focused on an ostensibly jurisdictional statute such as the one here further supports our conclusion. In *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997), the Court refused to apply retrospectively a statute that expanded the universe of plaintiffs who could bring certain qui tam claims under the False Claims Act ("FCA"). While acknowledging that the FCA amendment was phrased in

"jurisdictional terms," the Court held that the amendment "essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued." *Id.* at 1878. The Court rejected an argument that the amendment was merely "jurisdictional" and therefore had no retroactive effect (an argument identical to defendants' here). This is an additional reason for distinguishing our earlier pre-*Hughes* decision in *Salazar-Haro*. That case relied heavily on the substantive/jurisdictional dichotomy, *see* 95 F.3d at 311, yet the fact that a statute is phrased in jurisdictional terms is not reason enough to ignore the strong presumption against retroactivity, *see Hughes*, 117 S.Ct. at 1878.

The *Hughes* Court's reasoning, directly applicable to the present case, is worth rescribing at length:

> The fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity, not an exception to the rule itself. . . . As we stated in *Landgraf*:
>
> > "Application of a new jurisdictional rule usually 'takes away no substantive right but simply *changes* the tribunal that is to hear the case.' Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.' " [*Landgraf*, 511 U.S. at 274, 114 S.Ct. 1483 (emphasis added in *Hughes*).]
>
> Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause

> of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all. The 1986 amendment [to the FCA], however, does not merely allocate jurisdiction among fora. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

Id. (citations omitted).

In *Hughes*, the Court concluded that retrospective application of the FCA Amendment would have the legal effect of depriving the defendant of a particular defense, and that this constituted a retroactive effect. *See id.* at 1878-79. In the case at bar, retrospective application of the RICO Amendment would have the legal effect of depriving plaintiffs of a claim, which also constitutes a retroactive effect. The RICO Amendment, like the amendment at issue in *Hughes*, does not simply allocate jurisdiction among fora, determining where a claim might be brought; rather, it "[destroys] jurisdiction where [it] previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well." *Id.* at 1878.[17] Therefore, as in *Hughes*, we

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[17] Consider a useful analogy: an amendment in which Congress reduced the statute of limitations under RICO (which is currently longer than the limitations period under the

find that the allegedly jurisdictional amendment at issue here has retroactive effect. We then must look for clear intent from Congress to apply the new provision retrospectively.

D. Clear Intent to Apply Retrospectively

Defendants argue that the text of the RICO Amendment and its legislative history imply that Congress intended it to have retrospective application. We note at the outset that, given our finding that the Amendment has retroactive effect, a weak inference of Congress's intent is insufficient for retrospective application.[18]

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securities laws). Would we apply such an amendment retrospectively and bar Mathews's claim here? We suspect not, yet that is effectively what defendants are requesting that we do. *Cf. Burns v. Morton*, 134 F.3d 109, 111 (3d Cir.1998) (refusing to apply retrospectively a new statute of limitations in 28 U.S.C. § 2244(d)). Likewise, we would hesitate (absent clear congressional language to the contrary) to apply retrospectively a statute that eliminated treble damages under RICO. Rather, under *Landgraf* and *Hughes*, we would likely find that such an amendment affects the substantive rights of the parties and thus is presumed to apply only prospectively. Similarly, we fail to see how plaintiff's substantive rights would not be affected by retrospective application of the RICO Amendment in this case. Contrary to defendants' assertion, the Amendment does not merely affect "the secondary conduct of litigation" rather than the underlying "primary conduct of the parties." The primary conduct of the parties will certainly be affected now that defendants like Kidder, Peabody no longer find themselves subject to RICO's treble damages liability or its longer statute of limitations.

[18] The RICO Amendment was enacted, as part of the PSLRA, in late 1995, more than a year and a half after the

Rather, only Congress's expression of a clear intent that the statute be applied retrospectively will suffice. *See Landgraf*, 511 U.S. at 270, 114 S.Ct. 1483.[19] Defendants, in arguing that Congress intended the Amendment to have retrospective application, rely on the statute's text, its purpose, and its legislative history. We consider each in turn.

1. Text of the Act

First, according to defendants, because Title I of the Reform Act amended three different things – private actions under the 1933 and 1934 Securities Acts; the SEC's

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Landgraf decision was issued. While we express no opinion on Congress's obligation to parse every Supreme Court opinion for guidance, when the Court emphasizes "a requirement that Congress first make its intention clear," we are reluctant to find such intention in a statute passed more than a year later absent the utmost clarity.

[19] Even were we to conclude that the Amendment is without retroactive effect, normal rules of statutory construction – along with the "general presumption *against* retroactivity," *Hughes*, 117 S.Ct. at 1878 – would lead us to conclude that the Amendment should not be given retrospective application. We emphasize that the Court has clearly instructed that the general presumption against retroactivity applies at all times and not only when a statute is found to have retroactive effect. *See Lindh*, 117 S.Ct. at 2062 (re-affirming the "presumption against retroactivity"); *Hughes*, 117 S.Ct. at 1876 ("To the extent respondent contends that *only* statutes with [retroactive effect] are subject to our presumption against retroactivity, he simply misreads our opinion in *Landgraf*."). Further, in *Hughes*, a unanimous Court unequivocally rejected the notion that a jurisdictional statute enjoys "a strong presumption *in favor of* retroactivity." *Id.* at 1878.

authority to bring aiding-and-abetting claims under the securities laws; and civil securities fraud-based RICO claims – but the Applicability Provision only *expressly* provides for prospective application of the first of these, by negative implication, Congress must have intended retrospective application of the second and third category of amendments. According to defendants:

> By carefully distinguishing between amendments that relate to private actions under the Securities Laws on the one hand, and amendments that relate to the SEC's enforcement powers and to civil RICO actions on the other, Congress demonstrated that it knew how to restrict the application of specific provisions of the Reform Act to future filed cases. By expressly stating that the amendments affecting private actions under the Securities Laws shall only apply prospectively, Congress demonstrated its intent that the RICO Amendment and the SEC Provision should not be so restricted . . . .

Appellants' Br. at 21 (citing *Lindh*).

Contrary to defendants' implication, however, the Court in *Lindh* did not use a negative inference such as this to find the "clear intent" required to overcome a statute's retroactive effect, or even the intent we might look for to determine the temporal reach of a statute without retroactive effect. Rather, it used the negative inference to find that Congress intended a statute *not* to have retrospective application, rendering the entire retroactive-effect analysis unnecessary. *See Lindh*, 117 S.Ct. at 2063. We decline to turn the *Lindh* analysis on its head and to use nothing more than a negative inference to

discern a *clear* intent to apply a statute with retroactive effect to pending cases, thereby forcing them out of court.[20]

Even were we inclined to rely on a negative inference in a case such as the present one, we note that the reference to only the 1933 and 1934 Acts in the Applicability Provision lends itself to interpretations other than defendants' negative inference. It is possible that Congress mentioned only the amendments to the securities

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[20] Defendants cite our recent decision in *Southwestern Pennsylvania Growth Alliance v. Browner*, 121 F.3d 106 (3d Cir.1997), in support of their negative inference argument. In that case, we used the statutory interpretation canon *expressio unius est exclusio alterius* to conclude that a statute permitting judicial review of certain agency actions should be applied retrospectively to permit review of legislative rules promulgated before the effective date of the statute. *See id.* at 120 (noting that prospective application of the judicial review provision was explicitly required by the statute only for *interpretative* rules, not the *legislative* rules at issue in the case).

In *Southwestern Penn.*, we did not use the detailed formula outlined *supra* Part II.C. Nonetheless, we were fully cognizant in that case of the need to determine if "a statute's terms would produce a retroactive effect," 121 F.3d at 120 (internal quotations omitted), and we concluded the statute there did not, *see id.* ("[T]he SBREFA amendment concerning judicial review does not retroactively alter substantive rights, duties or liabilities."). Given this conclusion, we used "normal rules of [statutory] construction," *id.* (internal quotations omitted), to determine the temporal reach of an amendment which "prospectively changed the jurisdiction of the federal courts to allow judicial review of an agency's compliance with [a statute]." *Id.* This reasoning and result are fully consistent with our explication of the post-*Lindh* retroactivity analysis and our conclusion in the present case.

laws (and provided for their non-retroactivity) because of concern that many of these provisions, being procedural in nature, might be applied retrospectively in the absence of express statutory language to the contrary. *See Landgraf*, 511 U.S. at 275, 114 S.Ct. 1483 ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity."). By contrast, since the RICO Amendment was not procedural, no express provision was necessary to ensure that it would not be applied retrospectively. Rather, Congress quite likely intended the RICO Amendment to be governed by the usual rules of statutory interpretation,[21] including the analysis outlined in *Landgraf*, which was decided more than a year before the RICO Amendment was passed. We find this "inference" to be at least as strong as the one defendants attempt to draw from the lack of statutory language directly addressing the temporal reach of the RICO Amendment.

The Court in *Lindh* reached a similar conclusion regarding an applicability provision in the statute at issue there, which also applied only to certain portions of the entire statutory enactment. The Court posited that Congress might have been concerned about the judicial interpretation of a provision affecting both procedure and substantive rights, as it was unclear after *Landgraf* whether the presumption against applying substantive

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[21] Though reaching a different ultimate conclusion than we reach, the court in *Rowe v. Marietta Corp.* similarly found that the reference to only a portion of the Reform Act in the Applicability Provision indicated that "Congress intended the regular judicial rules of construction to apply" to the RICO Amendment. 955 F.Supp. 836, 848 (W.D.Tenn.1997).

statutes retrospectively or the qualified support for applying procedural statutes retrospectively would take precedence. *Lindh*, 117 S.Ct. at 2063-64. Therefore, Congress may have read *Landgraf* "as counseling the wisdom of being explicit if it wanted such a provision to be applied to cases already pending." *Id.* at 2064.

The Court went on to note that the same uncertainty (regarding judicial interpretation of the temporal reach of a "mixed" statute) was true of the provision at issue in that case, to which Congress had attached no applicability provision. *See id.* Congress's intent for the provision at issue in *Lindh*, the Court then concluded, must have been to leave the determination of retroactivity to the usual judicial interpretative tools, including the canons of statutory interpretation and the presumption against retrospective application of new statutes. The dissent in *Lindh* made a similar point: "Congress, while intending the AEDPA definitively to apply to pending capital cases, could have been uncertain or in disagreement as to which of the many portions of [the non-capital provisions] should or should not apply to pending cases. Congress could simply have assumed that the courts would sort out such questions, using our ordinary retroactivity presumptions." *Id.* at 2069 (Rehnquist, C.J., dissenting). Where the majority and dissent differed was on the conclusions reached after applying "ordinary retroactivity presumptions."

Earlier, in *Landgraf*, the Court made an analogous point, noting that it was "entirely possible – indeed, highly probable – that, because it was unable to resolve the retroactivity issue with the clarity of [prior] legislation, Congress viewed the matter as an open issue to be

resolved by the courts." 511 U.S. at 261, 114 S.Ct. 1483. Rejecting a negative-inference argument by the party arguing for retrospective application in that case, the Court held that "[w]e do not read either provision as doing anything more than definitively rejecting retroactivity with respect to the specific matters covered by its plain language." *Id.* at 261 n. 12, 114 S.Ct. 1483.

We find that the text of the Reform Act on which defendants here rely is open to a similar interpretation. Perhaps concerned that a "mixed" substantive and procedural provision might be given retrospective application, Congress explicitly provided for the temporal reach of the amendments affecting private causes of action under the securities laws. Less concerned about the more narrowly focused RICO and SEC Amendments, Congress failed to provide for their temporal reach, leaving resolution of this issue to the courts. The point is not that our inference is the correct one, nor even necessarily the most plausible one (though we believe it to be eminently plausible).[22] Rather, the point is that the text (and lack thereof) on which defendants rely is equally probative of a conclusion that the substantive provision at issue here

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[22] Another possible explanation is that the "failure to provide a clear expression of intent [regarding the RICO Amendment] resulted from the rushed nature of the debate and the proposal of the amendment." *In re Prudential Securities Inc. Ltd. Partnerships Litig.*, 930 F.Supp. 68, 81 (S.D.N.Y.1996); *see also Krear*, 961 F.Supp. at 1078 n. 20 (noting "that Congress could certainly have been more lucid in the drafting of this amendment").

should be applied only prospectively as it is of a conclusion that it should be applied to pending cases.[23]

In sum, we are unwilling to adopt defendants' negative inference from the text of the Applicability Provision. The text is addressed only to one of the three categories of amendments in Title I of the Reform Act. We refuse to read a clear intent from the *absence* of language in the Applicability Provision, or elsewhere in the Reform Act, addressing the temporal reach of the RICO Amendment. Particularly given the strong presumption against retroactivity, it would be strange indeed if Congress had used a silent negative inference to indicate that the RICO Amendment should be applied *retrospectively*.

2. Policy of the Act

Defendants argue that the policy undergirding the Reform Act makes clear that the RICO Amendment should be applied retrospectively. The purpose of the Act, according to defendants, was to foreclose the use of RICO in securities cases, as such use was unintended[24] and plaintiffs are afforded an adequate remedy under the securities laws. Defendants submit that Congress

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[23] This is not a case like *Scheidemann v. INS*, in which we used a textual analysis to discern congressional intent to apply a statute retrospectively, given that to do otherwise would have rendered portions of the statute ineffective, redundant, and "absurd." 83 F.3d 1517, 1524-26 (3d Cir.1996).

[24] We assume here, for the sake of discussing defendants' policy argument, that the application of civil RICO to securities fraud was "unintended"; we note, however, that this is far from a given. *See* 18 U.S.C. § 1961(1)(D); *see also supra* Part III.C.1.

believed that civil RICO, with its treble damages remedy and attorneys' fees provision, had been used for its *in terrorem* effect in garden variety securities disputes. Therefore, with the encouragement of the SEC, Congress moved to get rid of the availability of RICO for securities cases. Under this view, Congress's purpose would be thwarted if the RICO Amendment was not applied retrospectively because Congress was merely correcting an unintended mistake.

While there is some support for this alleged intent of Congress in the legislative history,[25] we emphasize again that if Congress felt it necessary to apply the RICO Amendment retrospectively in order to fulfill this policy, it would have been a simple matter to say so. Particularly in light of the Supreme Court's pre-PSLRA decision in *Landgraf*, we find untenable the argument that Congress would rely on an unstated, underlying policy to send the message to the courts that a statutory enactment should be applied to pending cases. When the Supreme Court requires Congress to speak in "express commands,"

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[25] *See, e.g.*, H.R. Conf. Rep. No. 104-369, at 47 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 746. There are some indications, however, that Congress evinced no intent with respect to the RICO Amendment, but rather that the Amendment was rushed through committee and added to the Reform Act the day before the House passed the Act. *See* 141 Cong. Rec. H2774, H2778 (daily ed. Mar. 7, 1995) (statement of Rep. Dingell); *id.* at H2778 (statement of Rep. Markey) (noting that the RICO Amendment was "a subject with no information before us except the opinions of a few Members who have been able to get a non-germane amendment put in order"). The debates over the Reform Act in the Senate include scant attention to the RICO Amendment.

"unambiguous directives," or "clear statements," *Lindh*, 117 S.Ct. at 2062, an appeal to inchoate policies will not suffice. *See Landgraf*, 511 U.S. at 285-86, 114 S.Ct. 1483 (noting that even when "retroactive application of a new statute would vindicate its purpose more fully . . . [this] is not sufficient to rebut the presumption against retroactivity"); *see also Hook v. Ernst & Young*, 28 F.3d 366, 372 (3d Cir.1994) (noting that even when "restorative intent is apparent, such intent does not reveal whether Congress intended [an] amendment to apply retroactively").

While defendants rely on the underlying policy of the RICO Amendment, we note that there is a competing policy at work here, namely the policy against retrospective application of new statutes:

> [R]etroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.

Landgraf, 511 U.S. at 266, 114 S.Ct. 1483. These concerns, while perhaps not as serious as in a case involving more traditionally "unpopular groups or individuals," are certainly applicable here. As defendants acknowledge, in enacting the PSLRA, Congress was concerned with the alleged "abusive practices"[26] of "shrewd plaintiffs' attorneys."[27] In reacting to the perceived abuses by so-called

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[26] Pub.L. No. 104-67, § 103, 109 Stat. 737, 756 (1995).

[27] 141 Cong. Rec. H2770 (daily ed. Mar. 7, 1995) (statement of Rep. Cox).

professional plaintiffs and their attorneys, and the frustration within the business community at having to defend allegedly burdensome and frivolous RICO suits, Congress could have gone so far as to destroy vested rights and obligations. But, as the Supreme Court has emphasized, if Congress seeks to respond to these political pressures in this manner, by reaching back in time to upset settled expectations, it must do so unequivocally and in a way that assures us that it has seriously considered the consequences of such action. We find no such unequivocal expression of intent here.

3. Legislative History

Finally, defendants rely on the legislative history of the RICO Amendment and the Applicability Provision to argue that the Amendment should be applied retrospectively. Defendants note that the bill that originally passed in the House of Representatives had a provision explicitly precluding retrospective application of *all* provisions in the Act. *See* H.R. 1058, 104th Cong. § 9 (1995) ("This Act and the amendments made by this Act are effective on the date of enactment of this Act and shall apply to cases commenced after such date of enactment."). The original Senate bill had no applicability provision. *See* 141 Cong. Rec. S1076-S1084 (daily ed. Jan. 18, 1995) (introducing S. 240, 104th Cong. (1995)). When the Senate revised its bill, it added, *inter alia*, an applicability provision that tracks the one finally passed as part of the Reform Act. *See id.* at S8890 (daily ed. June 22, 1995) (considering amended S. 240, 104th Cong. § 110 (1995)). According to

defendants, the Senate explicitly rejected the House applicability provision, which provided for prospective application of *all* amendments in the Reform Act, choosing instead a more limited applicability provision that did not provide for prospective application of the RICO Amendment. This choice was later codified into law when the Conference Committee chose – and both houses of Congress enacted – the Senate's more limited applicability language. Thus, defendants aver, Congress "deliberately" chose the more limited applicability provision because it sought to apply the RICO Amendment to pending cases.

Once again, however, we find defendants' reliance on unstated intentions, absent language, and explicit congressional directives in non-RICO areas of the Reform Act to be far from the clear evidence we seek when discerning congressional intent. We note that defendants offer no passages within the legislative history in which the issue of retroactivity is even discussed, let alone explicitly endorsed – no floor statements, no debate on the issue, nothing in congressional reports on the Reform Act, including the final Conference Committee Report. *See* H.R. Conf. Rep. No. 104-369 (1995); *see also* 1995 U.S.C.C.A.N. 679-748; *cf. United States v. Olin Corp.*, 107 F.3d 1506, 1514 (11th Cir.1997) (applying provision of CERCLA retrospectively, given text and purpose of statute, and extensive comments by legislators indicating their assumption that provision would be applied retrospectively). We are extremely reluctant to find the "clear statement" of congressional intent required by the *Landgraf/Lindh* analysis in the unexplained and unremarkable alteration of language in what was clearly a minor aspect

(i.e., the Applicability Provision) of a complex legislative scheme.

IV. Conclusion

Defendants urge us to apply the RICO Amendment retrospectively to eliminate plaintiff's (and other similarly situated plaintiffs') securities-based RICO claims. We find no express command from Congress that we do so. We also fail to see – in the underlying policy of the RICO Amendment (or of the Reform Act as a whole), in the simple text of the Applicability Provision, or in the sparse legislative history on this issue – the clear statement required to overcome the retroactive effect that would result from applying the Amendment to pending cases. As the Supreme Court has recently reiterated in *Landgraf, Hughes,* and *Lindh,* our courts have long looked with disfavor on the retrospective application of new statutes. Settled expectations and vested rights and obligations are highly prized in our legal system. Absent clear evidence "that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits," *Landgraf,* 511 U.S. at 272-73, 114 S.Ct. 1483, we are extremely reluctant to create causes of action that did not previously exist, or – as in this case – to destroy causes of action and remedies that clearly did exist before Congress acted.

We hold that the RICO Amendment of the Private Securities Litigation Reform Act does not apply to cases pending at the time the Act was enacted. We therefore affirm the order of the district court that Mathews may

proceed with his RICO claims against Kidder, Peabody and the other defendants.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3164

JOHN W. MATHEWS; CAROLE ANN NUCKTON; PATRICIA J. LESTER; JORDAN BRODSKY; THOMAS C. CHESTNEY; DEBORAH W. TROEMNER; WILLIAM J. WATERMAN, JR.; VERNON L. SCHATZ; MELVIN H. ROOTS ROBERT J. HOLTON; JAMES J. BOYLE; DAVID L. ROBINSON; VINCENT J. PANEPINTO; DOMINIC A. MARTELL; FRANCIS B. BORCATO; JOHN J. DOUGHERTY, Trustees of the Operative Plasterers & Cement Masons Local Union Officer & Employee Pension Fund; LEE CROSSMAN; SUSANNE DIANE ANDERSON; LARRY C. ANDERSON; GEORGE P. ARNOLD; ANN M. ARNOLD; DONALD J. AIBEL, on behalf of themselves and all others similarly situated

v.

KIDDER PEABODY & CO., INC., a Delaware corporation; KP REALTY ADVISERS, a Delaware corporation; HSM, Inc., a Texas corporation; HENRY S. MILLER CO., HENRY S MILLER MANAGEMENT; HENRY S. MILLER APPRAISAL CORPORATION; HSM REAL ESTATE SECURITIES CORPORATION; MILLER REAL ESTATE SERVICES CORPORATION, a Texas corporation,

Appellants

On Appeal From the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. 95-00085)

Present: Becker, *Chief Judge*, Aldisert and Weis, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel June 11, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court certified to this Court pursuant to 28 U.S.C. § 1292(b) by that Court's January 22, 1997 order, be, and the same is hereby affirmed and Mr. Matthews may proceed with his Racketeer Influenced and Corrupt Organizations Act claims against Kidder, Peabody & Co. and the other defendants. Costs taxed against the appellees. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: November 16, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3164

JOHN W. MATHEWS; CAROLE ANN NUCKTON; PATRICIA J. LESTER; JORDAN BRODSKY; THOMAS C. CHESTNEY; DEBORAH W. TROEMNER; WILLIAM J. WATERMAN, JR.; VERNON L. SCHATZ; MELVIN H. ROOTS ROBERT J. HOLTON; JAMES J. BOYLE; DAVID L. ROBINSON; VINCENT J. PANEPINTO; DOMINIC A. MARTELL; FRANCIS B. BORCATO; JOHN J.

DOUGHERTY, Trustees of the Operative Plasterers & Cement Masons Local Union Officer & Employee Pension Fund; LEE CROSSMAN; SUSANNE DIANE ANDERSON; LARRY C. ANDERSON; GEORGE P. ARNOLD; ANN M. ARNOLD; DONALD J. AIBEL, on behalf of themselves and all others similarly situated

v.

KIDDER PEABODY & CO., INC., a Delaware corporation; KP REALTY ADVISERS, a Delaware corporation; HSM, Inc., a Texas corporation; HENRY S. MILLER CO., HENRY S MILLER MANAGEMENT; HENRY S. MILLER APPRAISAL CORPORATION; HSM REAL ESTATE SECURITIES CORPORATION; MILLER REAL ESTATE SERVICES CORPORATION, a Texas corporation,

Appellants

On Appeal From the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. 95-00085)

Present: Becker, *Chief Judge*, Aldisert and Weis, *Circuit Judges*

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel June 11, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court certified to this Court pursuant to 28 U.S.C. § 1292(b) by that Court's January 22, 1997 order, be, and the same is hereby affirmed and Mr. Matthews may proceed with his Racketeer Influenced and Corrupt Organizations Act claims against Kidder, Peabody & Co. and the

other defendants. Costs taxed against the appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: November 20, 1998

APPENDIX C

John W. MATHEWS, on behalf of himself and all others similarly situated, Plaintiff,

v.

KIDDER, PEABODY & CO., INC., a Delaware corporation, KP Realty Inc., a Delaware corporation, HSM, Inc., a Texas corporation, Henry S. Miller Co., Henry S. Miller Management Corporation, Henry S. Miller Appraisal Corporation, HSM Real Estate Securities Corporation, and Miller Real Estate Services Corporation, a Texas corporation, Defendants.

Civil Action No. 95-85.

United States District Court,
W.D. Pennsylvania.

Sept. 26, 1996.

Picadio, McCall, Kane & Norton, Anthony P. Picadio, Pittsburgh, PA, Thomas W. Henderson, Pittsburgh, PA, for Plaintiff.

Kirkpatrick & Lockhart, David A. Brownlee, Pittsburgh, PA, for Defendant Kidder Peabody, K.P. Realty Advisors.

Thorp, Reed & Armstrong, William M. Wycoff, Pittsburgh, PA, for All Remaining Defendants.

OPINION

and

ORDER OF COURT

AMBROSE, District Judge.

Currently pending before the Court is the Motion for Leave to File First Amended Complaint (Docket # 37) filed by Plaintiff John W. Mathews ("Plaintiff Mathews"). Plaintiff Mathews has alleged on behalf of himself and a putative class (excluding Defendants and their directors, officers, agents, servants and affiliates), encompassing "all persons residing in the United States who purchased partnership units in KP/Miller Realty Growth Fund I, KP/Miller Growth Fund II and KP/Miller Realty Growth Fund III in the initial offering of such securities," that the Defendants' actions violated 18 U.S.C. § 1962(b), (c) and (d) of the Racketeer Influenced and Corrupt Organization Act ("RICO") and as well has alleged state law claims of breach of fiduciary duty and negligent misrepresentation. The Defendants, Kidder, Peabody & Co. Incorporated, KP Realty Advisers, Inc., HSM, Inc., Henry S. Miller Co., Henry S. Miller Management Corporation, Henry S. Miller Appraisal Corporation; HSM Real Estate Securities Corporation; and Miller Real Estate Services Corporation (the "Defendants") oppose the Plaintiff's Motion and in addition, ask this Court to dismiss the Plaintiff's Complaint in its entirety pursuant to Fed.R.Civ.P. 12(h)(3) on the theory that the Private Securities Litigation Reform Act of 1995 (the "Reform Act") removes this Court's jurisdiction over the federal claims in this action. For the reasons set forth below, the Plaintiff's Motion for Leave to File First Amended Complaint is granted in part and denied in part.

I. *The applicability of the Private Securities Litigation Reform Act of 1995 to this lawsuit.*

Plaintiff Mathews seeks to amend his Complaint pursuant to Fed.R.Civ.P. 15 in the following manner: (1) add additional named plaintiffs and (2) add factual allegations. In response, the Defendants have raised numerous legal arguments regarding why the Plaintiff should not be permitted to amend the Complaint.

Section 107 of the Reform Act, the section of the Reform Act that contains the amendment relevant to this case, reads in pertinent part: "[s]ection 1964(c) of Title 18, United States Code, is amended by inserting before the period ', except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962 . . . '." 109 Stat. 737, 758 (December 22, 1995). Unamended, 18 U.S.C. § 1964(c) ("§ 1964(c)") read "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c).

The RICO claim contained in the Proposed Complaint against the Defendants is based upon "conduct that would have been actionable as fraud in the purchase or sale of securities." Specifically, Plaintiff Mathews has alleged that in the 1980's, the Defendants devised a scheme to mislead a large number of unsophisticated "Mom and Pop" investors (in excess of 6000), through fraudulent conduct, into purchasing a series of limited

partnerships in order to generate excessive fees and income for the Defendants. Ultimately, three limited partnership funds were organized to perpetuate the Defendants' scheme: KP/Miller Realty Growth Fund I; KP/Miller Realty Growth Fund II; and KP/Miller Realty Growth Fund III. Sales of these three funds raised approximately $85 million.

The Defendants argue that applying the analysis set forth by the United States Court in *Landgraf v. USI Film Products*, 511 U.S. 244, ___, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229 (1994), regarding whether newly enacted statutes should be applied to pending cases, § 107 of the Reform Act should be applied to the Plaintiff's RICO claim because (1) "Congress's elimination of civil RICO as a method of litigating securities fraud cases, the specific wording of the Applicability Provision of the Reform Act [§ 108][1] and the legislative history surrounding the RICO Amendment and the Applicability Provision all demonstrate Congress's intent that the RICO Amendment should be generally applicable to all cases alleging 'conduct that would have been actionable' under the Securities Laws" and (2) even if the intent of Congress to apply § 107 retroactively is not clear, the application of § 107 to this case would not have a "retroactive effect" on Plaintiff Mathews' RICO claim because § 1964(c) is a jurisdictional statute. Defendants' Opposition Brief, pp. 19-20. Indeed,

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[1] Section 108 of the Reform Act, entitled "Applicability," states: "[t]he amendments made by this title shall not affect or apply to any private action arising under title I of the Securities Exchange Act of 1934 or title I of the Securities Act of 1933, commenced before and pending on the date of enactment of this Act." 109 Stat. 737, 758 (December 22, 1995).

with respect to the Defendants' argument that § 1964(c) is a jurisdictional statute, the Defendants request that I dismiss the Plaintiff's Complaint in its entirety pursuant to Fed.R.Civ.P. 12(h)(3) on the grounds that once the Reform Act was enacted into law by Congress on December 22, 1995, jurisdiction over private civil RICO claims was divested from the district courts and therefore, I no longer have jurisdiction over the Plaintiff's civil RICO claim.

In the *Landgraf* decision, the Court addressed the standards to be applied when ascertaining the applicability/retroactivity of a new law to cases pending when the law was enacted. Specifically, the *Landgraf* Court held that the following standard for determining retroactivity of new law to pending cases was to be applied:

> [w]hen a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at ___, 114 S.Ct. at 1505. Significantly, for purposes of the case *sub judice*, in discussing the application of new

legislation to pending cases and the issue of "retroactivity," the *Landgraf* Court further stated that "[w]e have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed" and cited to a number of its previous decisions including *Bruner v. United States*, 343 U.S. 112, 116-117, 72 S.Ct. 581, 584-85, 96 L.Ed. 786 (1952);[2] *Hallowell v. Commons*, 239

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[2] In *Bruner v. United States*, 343 U.S. 112, 72 S.Ct. 581, 96 L.Ed. 786 (1952), at issue was the jurisdiction of the federal district court to hear a claim under the Tucker Act. When the case was first filed, the Tucker Act granted to federal district courts jurisdiction, concurrent with the Court of Claims, over certain civil actions against the United States, including suits by an employee (but not an officer) of the United States to recover compensation from the United States; one of ten plaintiffs in *Bruner* was an employee, but not an officer, of the United States. Thereafter, while the suit was pending, the Tucker Act was amended such that the jurisdiction of the federal district courts over actions for compensation brought by employees of the United States was withdrawn.

Thus, the issue before the Court was whether the district court still had jurisdiction over the pending action. The Court held that the district court no longer had jurisdiction over the matter. This conclusion was first reasoned upon the fact that there was no reservation of jurisdiction over pending cases contained in the amendment. "Absent such a reservation, only the Court of Claims has jurisdiction to hear and determine claims for compensation brought by employees of the United States even though the District Court had jurisdiction over such claims when petitioner's action was brought." *Id.* at 115, 72 S.Ct. at 583-84, *citing Merchants' Insurance Co. v. Ritchie*, 5 Wall. 541, 18 L.Ed. 540 (1867). The Court then discussed at length its decisions in *Ritchie* and *The Assessors v. Osbornes*, 9 Wall. 567, 575, 19 L.Ed. 748 (1869).

In *Ritchie*, the Court had jurisdiction over a case which arose under the internal revenue laws when it was first filed,

but while the case was pending, an act was passed that withdrew the court's jurisdiction over cases arising under internal revenue laws without any reservation of pending cases. In holding that the court no longer had jurisdiction over the matter, the *Ritchie* Court had stated:

> [i]t is clear, that when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction. And it is equally clear, that where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction.

Id. at 116, 72 S.Ct. at 584.

In *The Assessors*, a case arising under the same internal revenue jurisdictional statute as applicable in *Ritchie*, the Court stated that " '[j]urisdiction in such cases was conferred by an act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no savings clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress'." *Id.*

Finally, the *Bruner* Court reasoned that "[t]his rule – that when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law – has been adhered to consistently by this Court" and cited to a number of its decisions in support of this proposition.

Notable for purposes of the issue before this Court, the *Bruner* Court also emphasized:

> [t]his case is not affected by the so-called general savings statute which provides that 'repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute.' Congress has not altered the nature or validity of petitioner's rights or the Government's liability but has simply reduced the

U.S. 506, 508-09, 36 S.Ct. 202, 203-04, 60 L.Ed. 409 (1916);[3] *The Assessors v. Osbornes*, 9 Wall 567, 575, 19 L.Ed. 748 (1869);[4] *Andrus v. Charlestone Stone Products Co., Inc.*, 436 U.S. 604, 607-08 n. 6, 98 S.Ct. 2002, 2005 n. 6, 56 L.Ed.2d 570 (1978);[5] *United States v. Alabama*, 362 U.S. 602, 604, 80

> number of tribunals authorized to hear and determine such rights and liabilities.

Id., citing, Hallowell v. Commons, 239 U.S. 506, 508, 36 S.Ct. 202, 203, 60 L.Ed. 409 (1916).

[3] In *Hallowell v. Commons*, 239 U.S. 506, 508, 36 S.Ct. 202, 203, 60 L.Ed. 409 (1916), the federal court had jurisdiction over the suit when the action was first filed. Prior to the matter being adjudicated, however, by statute, jurisdiction over the action was changed from the United States courts to the Secretary of the Interior with no exception being made in the statute for pending litigation. Thereafter, the suit was dismissed for want of jurisdiction and the plaintiff appealed arguing that based upon Rev.Stat. § 12, Comp.Stat.1913, § 14, which stated that the repeal of any statute shall not extinguish any liability incurred under it and those decisions concerning suits upon bonds given to the United States wherein intervening statutes were not applied to pending cases, that the amendment should not be applied to the pending case. *Id.* The Court disagreed with the plaintiff's argument and affirmed the decision of the lower court, reasoning that "the reference of the matter to the Secretary, unlike the changes with regard to suits upon bonds, takes away no substantive right, but simply changes the tribunal that is to hear the case." *Id.*

[4] See footnote 2, *supra*.

[5] In *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 98 S.Ct. 2002, 56 L.Ed.2d 570 (1978), an action to review a decision of the Secretary of the Interior, the Court addressed the validity of the plaintiff's allegations in his complaint that jurisdiction was based upon the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., and 28 U.S.C. §§ 1361 and 1391(e). First, the Court stated that 28 U.S.C. § 1391(e) is a venue statute and does not confer jurisdiction. Second, the Court noted that while the

S.Ct. 924, 926, 4 L.Ed.2d 982 (1960);[6] and *Stephens v. Cherokee Nation*, 174 U.S. 445, 478, 19 S.Ct. 722, 734, 43

APA may have been a proper basis for jurisdiction in the federal circuit court at the time the case was filed in 1973, the Court had subsequently determined that the APA does not confer subject-matter jurisdiction in the federal courts to review agency action and therefore, the Court could not have jurisdiction over the matter pursuant to the APA. Finally, the Andrus Court noted that it did not have to decide whether jurisdiction would lie under 28 U.S.C. § 1361 because jurisdiction in an action to review a decision of the Secretary of the Interior was clearly conferred by 28 U.S.C. § 1331(a), as amended in 1976 (i.e. after the suit had been commenced), and the fact that in 1973 the plaintiff's complaint did not allege $10,000 in controversy was immaterial.

[6] In *United States v. Alabama*, 362 U.S. 602, 80 S.Ct. 924, 4 L.Ed.2d 982 (1960), the United States brought suit against the State of Alabama and others, alleging a course of racially discriminatory practices calculated to deprive African-American citizens of their voting rights in violation of the United States Constitution and 42 U.S.C. § 1971(a) of the Civil Rights Act of 1957; the proceeding was brought by the United States pursuant to 42 U.S.C. § 1971(c). The district court dismissed the complaint against the State of Alabama on the ground that the Civil Rights Act of 1957 did not authorize the suit against the State. The Court of Appeals affirmed the holding and the United States Supreme Court granted certiorari.

Thereafter, shortly before the case was heard by the Supreme Court, the Civil Rights Act of 1960 became law. Section 601(b) of the Act amended 42 U.S.C. § 1971(c) "by expressly authorizing actions such as this to be brought against a State." Thus, the initial decision before the Court was the applicability of § 601(b) to the instant action. The Court observed that "[u]nder familiar principles, the case must be decided on the basis of law now controlling, and the provisions of § 601(b) are applicable to this litigation" and held that pursuant to § 601(b), the district court had jurisdiction to entertain the action against the State.

L.Ed. 1041 (1899).[7] The *Landgraf* Court also noted that "[a]pplication of a new jurisdictional rule usually 'takes

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[7] In *Stephens v. Cherokee Nation*, 174 U.S. 445, 19 S.Ct. 722, 43 L.Ed. 1041 (1899), the United States Supreme Court examined, *inter alia*, the validity of its hearing appeals from decrees of the United States court in the Indian Territory pursuant to the Act of July 1, 1898, an act which extended the remedy of appeal to the Supreme Court. The appellant argued that the Act "in extending the remedy by appeal to this court, was invalid, because retrospective, an invasion of the judicial domain, and destructive of vested rights." *Id.* at 477, 19 S.Ct. at 734.

Contrary to the appellant's argument, the Court noted:

> [b]y its terms the act was to operate retrospectively, and as to that it may be observed that, while the general rule is that statutes should be so construed as to give them only prospective operation, yet, where the language employed expresses a contrary intention in unequivocal terms, the mere fact that the legislation is retroactive does not necessarily render it void. . . . [T]he grant of a new remedy by way of review has been often sustained under particular circumstances.

Id. The *Stephens* Court then went on to explain that "the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of [the United States Constitution]." *Id.* The Court also stated:

> nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review; and the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of a lower court beyond the power of re-

away no substantive right but simply changes the tribunal that is to hear the case'." *Id.* at ___, 114 S.Ct. at 1502, *citing, Hallowell,* 239 U.S. at 508, 36 S.Ct. at 203. The Court continued, "[p]resent law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties'." *Id.* at ___, 114 S.Ct. at 1502, *citing, Republic National Bank of Miami v. United States,* 506 U.S. 80, 100, 113 S.Ct. 554, 565, 121 L.Ed.2d 474 (1992) (Thomas, J., concurring).[8]

> examination by a higher court, though subsequently authorized by general law to exercise jurisdiction.

Id.

[8] In *Republic National Bank of Miami v. United States,* 506 U.S. 80, 113 S.Ct. 554, 121 L.Ed.2d 474 (1992), Justice Thomas filed a concurring opinion because he disagreed with the majority's decision to discuss the issue of jurisdiction under the circumstances of the case. Justice Thomas then went on to discuss the concept of retroactive application of newly enacted statutes to pending claims. The Justice began his discussion on jurisdiction by noting the general rule that "statutes affecting substantive rights or obligations are presumed to operate prospectively only." *Id.* at 100, 113 S.Ct. at 565. He then explained that: "[b]ut not every application of a new statute to a pending case will produce a 'retroactive effect'. '[W]hether a particular application is retroactive' will 'depen[d] upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated'." *Id.* at 100, 113 S.Ct. at 565 (internal citations omitted). Justice Thomas then summarized the Supreme Court's position on the applicability of newly enacted statutes restricting or enlarging a court's jurisdiction to pending cases:

> [i]n the case of newly enacted laws restricting or enlarging jurisdiction, one would think that the 'determinative event' for retroactivity purposes

In response to the Defendants' contention that the Reform Act bars this action altogether, Plaintiff Mathews argues that the Reform Act is not to be applied retroactively to this law suit, which was pending when the Reform Act was passed, because the Reform Act is not a jurisdictional statute but rather, one that alters substantial rights the Plaintiff and the other class members had when the suit was filed and in support thereof, cites to the United States Supreme Court's decision in *Landgraf, supra.* The Plaintiff also cites, *inter alia,* to two district court decisions which held that pursuant to the principles espoused in *Landgraf,* § 107 of the Reform Act is not to be applied retroactively to a RICO claim currently pending

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would be the final termination of the litigation, since statutes affecting jurisdiction speak to the power of the court rather than to the rights or obligations of the parties. That conclusion is supported by longstanding precedent. We have always recognized that when jurisdiction is conferred by an Act of Congress and that Act is repealed, 'the power to exercise jurisdiction [is] withdrawn, and . . . all pending actions f[a]ll, as the jurisdiction depend[s] entirely upon the act of Congress.' *The Assessors v. Osbornes,* [*supra.*]. 'This rule – that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law – has been adhered to consistently by this Court.' *Bruner v. United States,* [*supra.* (citing cases)]. Moreover, we have specifically noted that '[t]his jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication'.

Id.

at the time the Reform Act was enacted because application of the Reform Act to the RICO claims would impair substantial rights possessed by the plaintiffs. *See In re Prudential Securities Incorporated Limited Partnerships Litigation*, 930 F.Supp. 68 (S.D.N.Y.1996) and *District 65 Retirement Trust for Members of the Bureau of Wholesale Sales Reps. v. Prudential Securities, Inc.*, 925 F.Supp. 1551 (N.D.Ga.1996).

After careful consideration of the submissions of the parties, I hold first that while I agree with the Defendants that § 1964(c) is, in part, a jurisdictional statute,[9] I also find that the effect of applying § 107 to the facts presented in this case is distinguishable from the effects obtained in those United States Supreme Court cases cited to in the Defendants' multiple briefs on this issue. For example, in *Bruner v. United States*, 343 U.S. 112, 72 S.Ct. 581, 96 L.Ed. 786 (1952), discussed in detail *supra*, and in the other cases where the effect of the intervening jurisdictional statutes did not completely eliminate the plaintiff's claim, but rather, merely altered the court which had jurisdiction over the matter, Plaintiffs were not deprived of their causes of action. Applying § 107 of the Reform Act to the case *sub judice* clearly will deprive Plaintiff Mathews and the other class members of their causes of action under § 1962 of RICO, which were viable

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[9] Contrary to Plaintiff Mathews' position on this issue, in *Tafflin v. Levitt*, 493 U.S. 455, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990), the United States Supreme Court expressly described § 1964(c) as providing a "grant of federal jurisdiction." *Id.* at 460, 110 S.Ct. at 795-96.

at the time this lawsuit was filed. In other words, application of the Reform Act will not merely change the forum in which the Plaintiff and the class members can bring the RICO claims contained in the Proposed Complaint, but will actually deprive them of their day in court altogether. *See Hartford Cas. Ins. Co. v. F.D.I.C.*, 21 F.3d 696, 700 (5th Cir.1994) ("[t]his Court has previously . . . [held] that amendments to statutes which affect procedural or remedial rights generally apply to pending cases, where such change does not deprive a party of its ' "day in court" '. 'When Congress adopts statutory changes while a suit is pending, the effect of which is not to eliminate substantive right but rather to "change the tribunal which will hear the case," those changes – barring specifically expressed intent to the contrary – will have immediate effect'.") Thus, it is necessary to proceed to the analysis set forth in *Landgraf* and determine whether or not the Reform Act can properly be applied to the action now before me.

Upon consideration of the *Landgraf* analysis, contrary to the Defendants' position that based upon the plain language of § 108 of the Reform Act, the purpose of the Reform Act, the legislative history of the Reform Act and viewing the Reform Act as a whole there is clear Congressional intent that the Reform Act be applied retroactively to pending cases, I conclude first that no clear Congressional intent that § 107 be applied to cases pending when the Reform Act was passed exists.[10] Therefore, it is necessary

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[10] Specifically, in arguing that § 107 should be applied to defeat Plaintiff Mathews' claim, the Defendants contend that considering the plain language of § 108 of the Reform Act, the

to proceed to the second prong of the *Landgraf* analysis and determine whether application of the Reform Act to the RICO count would have a "retroactive" effect on the action such that the Reform Act should not govern in the instant matter. As stated above, a new statute has a retroactive effect on a pending case if it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. *Landgraf*, 511 U.S. at ___, 114 S.Ct. at 1505.

Clearly, applying the Reform Act retroactively to the case *sub judice* will impair rights Plaintiff Mathews and the class members possessed when this law suit was brought in that if applied, the Reform Act will deprive them of their RICO causes of action which were viable at the time this lawsuit was filed. *See also In re Prudential Securities*, 930 F.Supp. at 79 (court held that the Reform Act impaired the plaintiffs' ability to recover for actions which may have violated federal law because it would strip the plaintiffs' complaint of RICO claims after the statute of limitations for securities fraud claims has likely expired and therefore, the statute should not function retroactively without a clear expression of congressional

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purpose of the Reform Act, the legislative history of the Reform Act and viewing the Reform Act as a whole, the clear intent of Congress was to apply the Reform Act to pending cases such as the one *sub judice* because "[i]f Congress had intended to foreclose the retrospective application of the Reform Act in actions arising under RICO, as it did in actions arising under the 1933 and 1934 Acts, it would have said so." Defendants' Opposition Brief, p. 14.

intent which the court did not find). Accordingly, I conclude that the Reform Act is inapplicable to the action at hand to the extent that the Defendants argue that it mandates the complete dismissal of the RICO count in this action. I do, however, recognize that the Defendants' arguments concerning the applicability of § 107 to this action are viable alternatives and therefore, in the event that Defendants decide that an interlocutory appeal of the applicability of the Reform Act to the case at hand is advisable, I will certify such an appeal.

II. *Application of the Reform Act to the Request for Injunctive Relief.*

In the "WHEREFORE" clause of Count I of the Proposed Complaint, injunctive relief is requested in the form of "the entry of an order enjoining the Defendants from continuing to act in an unlawful manner in connection with the partnerships . . . " The Defendants argue that (1) the Reform Act would bar this request for prospective relief, (2) the application of the Reform Act to the request for prospective relief does not have a retroactive effect under *Landgraf* because the Plaintiff has no vested right in future injunctive relief and (3) therefore, the request for injunctive relief stated in the Proposed Complaint should be disallowed. Defendants' Opposition Brief, p. 24, *citing, Landgraf, supra,* and *Pic-A-State PA, Inc. v. Commonwealth of Pennsylvania,* 42 F.3d 175 (3d Cir.1994). Plaintiff Mathews responds summarily that "Defendants' Brief at 22-24 argues that the Reform Act applies prospectively to Mathews' claim for injunctive relief. Plaintiff does not concede that this argument has merit, but the

Court should not now determine at this time the effect of the Reform Act on this claim for ancillary relief in an action that essentially seeks money damages." Plaintiff's Memorandum in Response to Defendants' Brief in Opposition to Plaintiff's Motion for Leave to File First Amended Complaint, p. 16.

In *Landgraf*, the Court stated:

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive. Thus, in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 42 S.Ct. 72, 66 L.Ed. 189 (1921), we held that § 20 of the Clayton Act, enacted while the case was pending on appeal, governed the propriety of injunctive relief against labor picketing. In remanding the suit for application of the intervening statute, we observed that 'relief by injunction operates *in futuro*,' and that the plaintiff had no 'vested right' in the decree entered by the trial court. 257 U.S. at 201, 42 S.Ct. at 75-76.

Landgraf, 511 U.S. at ___, 114 S.Ct. at 1501. The relevant provision of the Clayton Act reviewed in *American Steel Foundries v. Tri-City Central Trades Council, supra.*, altered the standard for evaluating the propriety of injunctive relief against labor picketers.

In *Pic-A-State PA, Inc. v. Commonwealth of Pennsylvania*, 42 F.3d 175 (3d Cir.1994), subsequent to the trial court

declaring a Pennsylvania statute unconstitutional as violative of the Commerce Clause and entering an order permanently enjoining its enforcement, a federal statute was passed which made the conduct of a business that sells an interest in another state's lottery a federal crime. The Commonwealth of Pennsylvania then timely appealed the issuance of the permanent injunction and argued that the federal statute should be utilized by the appellate court in assessing the constitutionality of the state statute. The plaintiff disagreed and argued that to apply the federal statute would have a retroactive effect. Upon review, the appellate court held, in relevant part, that it was proper to apply the new statute in assessing the constitutionality of the state statute because, citing to *Landgraf*, to do so would not have a retroactive effect:

> [i]n the matter before us, application of the [federal statute] to the issue presented to this court attaches no new legal consequences to the activity engaged in by [the plaintiff] prior to the enactment of the [federal statute]. In its complaint, [the plaintiff] sought an injunction to bar the prospective enforcement of [the state statute] following its . . . effective date. As the Supreme Court has noted, "relief by injunction operates *in futuro*. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive".

Pic-A-State PA, Inc., 42 F.3d at 178 (internal citations omitted).

Contrary to Plaintiff Mathews' assertion that I should wait on the decision of whether the Reform Act is to be applied such that the request for injunctive relief can not

be a part of the Proposed Complaint, I see no reason why this issue cannot be decided at this time. Therefore, based upon my review of *Landgraf* and *Pic-A-State PA, Inc.*, I conclude that because the Reform Act affects the propriety of my awarding any prospective relief in this action, application of the new provision to the request for injunctive relief is proper and does not have a retroactive effect. Accordingly, to the extent that the request for injunctive relief in Count I of the Proposed Complaint seeks an order enjoining conduct that would have been actionable as fraud in the purchase or sale of securities, said remedial request contained in the "WHEREFORE" clause of Count I of the Proposed Complaint is no longer a viable request and therefore, Plaintiff Mathews may not amend his Complaint to include in the "WHEREFORE" clause of the RICO count a request for injunctive relief in the form of an order enjoining further conduct by the Defendants that would have been actionable as fraud in the purchase or sale of securities in connection with the partnership funds.

III. *The Propriety of Plaintiff Mathews's Proposed Amendment to Add Additional Plaintiffs and Additional Facts.*

The Defendants also argue that in his Proposed Complaint, Plaintiff Mathews improperly seeks to add new plaintiffs to the case and to assert through them, claims that have already been dismissed, i.e. the claims regarding Funds I and III. In support of this position, the Defendants first state:

> [t]wo facts are beyond contest. First, Mathews originally brought claims with respect to Funds

> I and III that he had no standing to pursue. As of December 19, 1995, those claims had been dismissed, and this action contained no RICO claim with respect to those two Funds. *See* December 19 Order. Second, Mathews now seeks to add new plaintiffs who would themselves assert claims with respect to Fund I and III that he lacks standing to pursue.

Defendants' Brief in Opposition to Plaintiff's Motion for Leave to File First Amended Complaint ("Defendants' Opposition Brief"), p. 6. The Defendants then discuss the United States Court of Appeals for the Fifth Circuit decision in *Summit Office Park, Inc. v. United States Steel Corp.*, 639 F.2d 1278 (5th Cir.1981) and state that: "[s]imilarly [to the facts in *Summit Office Park*], this Court has determined that Mathews has no standing to pursue RICO claims relating to Funds I and III. Accordingly, Mathews has no "identity of interest" with those plaintiffs he now improperly attempts to add by "amending" his Complaint in order to pursue claims relating to those Funds." Defendants' Opposition Brief, p. 7. The Defendants also cite to *Turner v. First Wisconsin Mortgage Trust*, 454 F.Supp. 899, 913 (E.D.Wis.1978); *Schwartz v. The Olympic, Inc.*, 74 F.Supp. 800, 801 (D.Del.1947) and *O'Donnell v. Kusper*, 602 F.Supp. 619, 624 (N.D.Ill.1985) for the proposition that "[o]ther courts have held that a plaintiff who lacks standing to pursue a claim has no right to amend the complaint to bring in other parties who will remain plaintiffs when the complaint is dismissed as to the original plaintiff." Defendants' Opposition Brief, pp. 7-8.

In addressing the Defendants' position on these issues, I first take the opportunity to clarify what effect my Opinion and Order dated December 19, 1995 meant to

the posture of the case now before me. The Defendants apparently are of the opinion that by my Order dated December 19, 1995 wherein the Defendants' Motion to Dismiss was granted "as to the issue of Plaintiff's standing to pursue a RICO claim with respect to Funds I and III," this case is now limited to a single plaintiff and his claims relating to Fund II. *See, for example,* Defendants' Opposition Brief, p. 8 ("This Court has previously dismissed all claims with respect to Fund I and III."). To the contrary, as stated in my Opinion dated December 19, 1995, in ruling on the Defendants' Motion to Dismiss, I focused only upon those claims made by Plaintiff Mathews in his individual capacity and not the claims of the class with respect to Fund I, II and III. In other words, by my Opinion and Order dated December 19, 1995, I was clarifying that to the extent the Plaintiff was seeking to recover damages with respect to Funds I and III, he had suffered no such injury and therefore, could not recover any damages related to those funds.

Further, I find that all of the cases cited by the Defendants as dispositive on this issue are factually distinguishable from the case *sub judice*.[11] Specifically, first,

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[11] Specifically, the facts underlying *Summit Office Park* are distinguishable because in *Summit Office Park* the trial court had dismissed the claims of both the named plaintiff and the class it sought to represent, and struck an amended complaint which attempted to: (1) create a new and different class; (2) substitute for the dismissed plaintiff two other plaintiffs as parties plaintiff and as representatives of the new and different class and (3) change the cause of action in the complaint. Notably, upon appeal by the plaintiff, the *Summit Office Park* court held: "we hold only that where a plaintiff never had standing to assert a claim against the defendants, it does not have standing to

Plaintiff Mathews is still a plaintiff in this action and has standing to litigate the impropriety of the Defendants'

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amend the complaint and control the litigation by substituting new plaintiffs, a new class, and a new cause of action." *Id.* at 1282. The court further stated: "[s]ince there was no plaintiff before the court with a valid cause of action, there was no proper party available to amend the complaint." *Id.*

Likewise, *O'Donnell v. Kusper*, 602 F.Supp. 619 (N.D.Ill.1985), is distinguishable from the case at hand. In *O'Donnell*, a case which was not a class action, the court refused to add/substitute a new plaintiff who sought to be added/substituted for the original plaintiff whose claims were brought on behalf of the County and not on his own behalf because the new plaintiff also did not have standing to sue on behalf of the County and any claim brought on its own behalf would be a completely new cause of action. *Id.* at 624. The *O'Donnell* court explained the issue before it as being "whether the court should allow a new plaintiff, seeking different relief, to substitute for a plaintiff dismissed for lack of standing" and concluded that Fed.R.Civ.P. 17(a) was "not intended to permit an attorney to locate and substitute a new plaintiff, upon a new claim simply to sustain a pending action." *Id., citing*, Wright & Miller, Federal Practice and Procedure, § 1555 (1984).

The facts in *Turner v. First Wisconsin Mortgage Trust*, 454 F.Supp. 899, 913 (E.D.Wis.1978) are also distinguishable from the instant action as are the facts in *Schwartz v. The Olympic, Inc.*, 74 F.Supp. 800, 801 (D.Del.1947). In *Turner*, the plaintiff had brought a class action for relief arising out of an allegedly fraudulent course of conduct engaged in by the defendants, which the plaintiff alleged was violative of a number of the federal securities laws. The *Turner* court found that the plaintiff had no cause of action on the federal claims and on that basis denied her motion for leave to amend the complaint to add as parties plaintiff an individual and a trustee of trust who had causes of action on the federal claims. In so holding, the court opined that "a plaintiff who cannot maintain her own complaint has no right to amend it pursuant to Rule 15 of the Federal Rules of Civil Procedure to bring in other parties who will thereafter

conduct and thus, to assert the RICO claim contained in the Proposed Complaint against the Defendants which alleges a single scheme whereby all three funds were involved; he is merely limited in recovery to the injury he suffered with respect to Fund II, i.e. he does not have standing to recover for all injuries suffered as a result of the Defendants' unlawful conduct. Second, the parties sought to be named as parties plaintiff are and have been members of the class of investors who invested in the three KP/Miller funds since the Complaint was first filed. Third, the Proposed Complaint does not seek to change the causes of action stated in the original complaint. Thus, I find that the proposed amended complaint does not have "the characteristics of a new lawsuit rather than an amended complaint," and therefore, said amendment will not be futile and Plaintiff Mathews can amend his Complaint to add the additional named plaintiffs and to allege additional facts. *Summit Office Park*, 639 F.2d at 1284.

I will also address the Defendants' argument that the proposed Plaintiffs' Fund I, II and III claims are barred by

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remain when the complaint is dismissed as to the original plaintiff." *Id.* at 913.

In *Schwartz*, again not a class action, the plaintiff, an unregistered stockholder, sought to set aside a merger of two corporations. The well-established law in Delaware was that an unregistered stockholder could not attack a merger. On that basis, the court dismissed the plaintiff's claims and denied his motion to amend his complaint to bring in other parties as plaintiffs (presumably individuals who were registered stockholders), holding that "[i]f he cannot maintain his own complaint, he has no right to amend it." *Schwartz*, 74 F.Supp. at 801.

the Reform Act because they are based upon conduct that would have been actionable as fraud in the purchase or sale of securities and were first advanced after the Reform Act was adopted. Defendants' Opposition Brief, pp. 11 and 12 n. 5. As indicated above, the claims of these additional plaintiffs are not new causes of action, but rather, are claims that have been a part of the action since Plaintiff Mathews first instituted this class action on behalf of both himself and those who invested in the KP/ Miller funds and, therefore, this is not a "relation back" factual scenario as the Defendants argue. Simply stated, it would be illogical to hold that Plaintiff Mathews can sue in a representative capacity on behalf of the plaintiffs the Motion to Amend seeks to add and, if he is successful, to hold that these plaintiffs will recover damages from the Defendants, and, at the same time, conclude that these plaintiffs cannot be individually named as parties plaintiff in the action.

Accordingly, because I find that it would not be futile to allow Plaintiff Mathews leave to amend the Class Action Complaint to add these additional parties plaintiff and to add new factual allegations, Plaintiff Mathews' Motion for Leave to File First Amended Complaint is granted with the exception stated above that his amended Complaint shall not contain in the "WHEREFORE" clause of the RICO count, a request for injunctive relief in the form of an order enjoining further conduct by the Defendants that would have been actionable as fraud in the purchase or sale of securities in connection with the partnership funds.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN W. MATHEWS, on behalf of himself and all others similarly situated, Plaintiff, -vs- KIDDER, PEABODY & CO., INC., a Delaware corporation, KP REALTY ADVISERS, INC., a Delaware corporation, HSM, INC., a Texas corporation, HENRY S. MILLER CO., HENRY S. MILLER MANAGEMENT CORPORATION, HENRY S. MILLER APPRAISAL CORPORATION, HSM REAL ESTATE SECURITIES CORPORATION, and MILLER REAL ESTATE SERVICES CORPORATION, a Texas corporation, Defendants.	)	Civil Action No. 95-85

AMBROSE, District Judge.

ORDER OF COURT

AND NOW, this **26th** day of September, 1996, after careful consideration of the submissions of the parties, and for the reasons set forth in the Opinion accompanying this Order, it is hereby **ORDERED** that Plaintiff John W. Mathews' Motion for Leave to File First Amended Complaint (Docket #:37) is granted in part and denied in part:

Plaintiff Mathews is **GRANTED** leave to amend his Complaint to add the requested additional parties as named plaintiffs and to add the requested new factual allegations.

It is further **ORDERED** that Plaintiff Mathews is **DENIED** leave to amend his Complaint to request in the "WHEREFORE" clause of the RICO count a request for injunctive relief in the form of an order enjoining further conduct by the Defendants that would have been actionable as fraud in the purchase or sale of securities in connection with the partnership funds.

BY THE COURT:

/s/ Donetta W. Ambrose
Donetta W. Ambrose,
U.S. District Judge

PC ALL COUNSEL OF RECORD
BUREAU OF NATIONAL AFFAIRS
MATTHEW BENDER & CO.
FILE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN W. MATHEWS, on behalf of himself, and all others similarly situated, Plaintiff, -vs- KIDDER, PEABODY & CO., INC., a Delaware corporation, KP REALTY ADVISORS, INC., a Delaware corporation, HSM, INC., a Texas Corporation, HENRY S. MILLER CO., HENRY S. MILLER MANAGEMENT CORPORATION, HENRY S. MILLER APPRAISAL CORPORATION, HSM REAL ESTATE SECURITIES CORPORATION, and MILLER REAL ESTATE SERVICES CORPORATION, a Texas corporation, Defendants.	Civil Action No. 95-85

AMBROSE, District Judge.

ORDER OF COURT

AND NOW, this **22nd** day of January, 1997, after careful consideration of the submissions of the parties, it is hereby **ORDERED** that Defendants' Motion to Modify September 26, 1996 Order to Permit Interlocutory Appeal (Doc. #56) is **GRANTED**. This Court's September 26, 1996 Order is **MODIFIED** to read:

AND NOW, after careful consideration of the submissions of the parties, and for the reasons set forth in the Opinion accompanying this Order, it is hereby **ORDERED** that Plaintiff John W. Mathews' Motion for Leave to File First Amended Complaint (Docket #37) is granted in part and denied in part:

Plaintiff Mathews is **GRANTED** leave to amend his Complaint to add the requested additional parties as named plaintiffs and to add the requested new factual allegations.

It is further **ORDERED** that Plaintiff Mathews is **DENIED** leave to amend his Complaint to request in the "WHEREFORE" clause of the RICO count a request for injunctive relief in the form of an order enjoining further conduct by the Defendants that would have been actionable as fraud in the purchase or sale of securities in connection with the partnership funds.

Moreover, in recognition of the requirements set forth in 28 U.S.C. § 1292(b), it is further **ORDERED** that this Court is of the opinion that the issue of the applicability of the Private Securities Litigation Reform Act of 1995 to this case involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation.

BY THE COURT:

/s/ Donetta W. Ambrose
Donetta W. Ambrose,
U.S. District Judge

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FILE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN W. MATHEWS, on behalf of, himself and all others similarly situated,	)	
Plaintiff,	)	Civil Action No. 95-85
-vs-	)	
KIDDER, PEABODY & CO., INC., a Delaware corporation, KP REALTY ADVISORS, INC., a Delaware corporation, HSM, INC., a Texas corporation, HENRY S. MILLER CO., HENRY S. MILLER MANAGEMENT CORPORATION, HENRY S. MILLER APPRAISAL CORPORATION, HSM REAL ESTATE SECURITIES CORPORATION, and MILLER REAL ESTATE SERVICES CORPORATION, a Texas corporation,	)	
Defendants.	)	

AMBROSE, District Judge.

OPINION

and

ORDER OF COURT

Pending before this Court is the joint Motion of Defendants, Kidder, Peabody & Co. Incorporated, KP Realty Advisers, Inc., HSM, Inc., Henry S. Miller Co., Henry S. Miller Management Corporation, Henry S. Miller Appraisal Corporation, HSM Real Estate Securities Corporation and Miller Real Estate Services Corporation, to Dismiss for Failure to State a Claim or, in the Alternative, for Summary Judgment (Docket #: 10) ("Joint Motion"). The Plaintiff has alleged claims against all of the Defendants for civil RICO violations and negligent misrepresentation and against Defendants KP Realty Advisers, Inc., Kidder, Peabody & Co., Incorporated and Miller Real Estate Services Corporation for breach of fiduciary duty. Because no discovery has yet taken place and, given the complexity of the matter, I will treat the Joint Motion as one to dismiss pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 12(b)(6) and not as a motion for summary judgment under Fed. R. Civ. P. 56. *See Berk v. Ascott Inv. Corp.*, 759 F. Supp. 245, 248 (E.D. Pa. 1991). For the reasons set forth below, the Defendants' Joint Motion shall be granted as to the issue of standing and denied as to all other issues without prejudice to renew these issues in a motion for summary judgment at the close of the discovery period.

In deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6), all factual allegations and all reasonable inferences therefrom must be accepted as true and viewed in the light most favorable to the plaintiff. *Colburn v. Upper*

Darby Township, 838 F.2d 663, 666 (3d Cir. 1988), *cert. den'd*, 489 U.S. 1065 (1989). A court may dismiss a complaint only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45 (1857). In ruling on a motion to dismiss for failure to state a claim, a court looks to "whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer." *Colburn*, 838 F.2d at 666. The standard of review with respect to deciding a motion to dismiss is, of course, the same for RICO and non-RICO claims. *Gurfein v. Sovereign Group et al.*, 826 F. Supp. 890, 897 (E.D. Pa. 1993), *citing*, *Rose v. Bartle*, 871 F.2d 331, 355 (3d Cir. 1989).

FACTS

The Plaintiff asserts the following facts in his complaint and RICO case statement, which for the purpose of this Motion, I Court will accept as true.[1]

Defendant Kidder, Peabody & Co., Incorporated is engaged in the investment banking and financial services business throughout the United States. Defendant KP Realty Advisers, Inc. is a wholly owned subsidiary of Kidder, Peabody & Co., Incorporated and is a general partner of the limited partnerships at issue in this action. Defendant Kidder, Peabody & Co., incorporated formed

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[1] A court may consider the plaintiff's RICO case statement in assessing whether a plaintiff's RICO claims should be dismissed. *Glessner v. Kenny*, 952 F.2d 702, 712 n. 9 (3d Cir. 1991).

KP Realty Advisers, Inc. for the sole purpose of participating in and furthering the scheme at issue in this action and at all times material hereto, controlled, acted through, and was the alter ego of KP Realty Advisers, Inc. Defendants Kidder, Peabody & Co., Incorporated and KP Realty Advisers, Inc. will hereinafter be collectively referred to as "Kidder Peabody."

Defendant HSM, Inc. is engaged in the real estate brokerage and management business. It controls, is the alter ego of, and owns defendants Henry S. Miller Co., Henry S. Miller Management Corporation, Henry S. Miller Appraisal Corporation and HSM Real Estate Securities Corporation, all which participated in the formation or execution of the scheme at issue in this action. Defendant Miller Real Estate Services Corporation was established for the purpose of participating in and furthering the scheme at issue in this action and is a general partner in the limited partnerships at issue in this action. At all times material hereto, HSM, Inc. and its other subsidiaries controlled, acted through and were the alter ego of Miller Real Estate Services Corporation. Defendant HSM Real Estate Securities Corporation is a wholly owned subsidiary of HSM, Inc. which sold to the investing public a portion of the partnership units referred to below. HSM, Inc. and its subsidiaries will hereinafter be collectively referred to as the "Miller Organization."

Kidder Peabody and the Miller Organization devised a scheme to generate excessive fees, commissions and other income for themselves and their subsidiaries and affiliates by organizing, promoting, sponsoring and managing a series of three limited partnerships to be used as vehicles through which investment funds could be

obtained from the investing public for the purported purpose of making sound, conservative and safe investments in commercial real estate projects, but which, in fact, was for the true purpose of generating excessive fees and incomes for Kidder Peabody and the Miller Organization. As part of the scheme, Kidder Peabody and the Miller Organization agreed that investments in the limited partnerships would be recommended to, and would be misrepresented as being suitable for, small, conservative, unsophisticated investors. In order to make the investments attractive to such investors, it was agreed that the investments would be sold in units as low as $500.00. Kidder Peabody and the Miller Organization further agreed, as part of the scheme, that Kidder Peabody would be the exclusive selling agent of investments in the partnerships and the Miller Organization would be the managing agent for the partnerships' real estate investments. The defendants further agreed under the scheme that they or their affiliates would take a number of fees and commissions for themselves from the money raised from investors in the three limited partnerships and that the Miller Organization would receive certain fees based upon rentals. In particular, the defendants agreed that they would take from the money raised: (1) a selling commission of eight percent (8%) payable to Kidder Peabody; (2) an acquisition fee of up to six percent (6%) for purchasing interests in properties on behalf of the partnerships, to be divided equally between Kidder Peabody and the Miller Organization; (3) an eight percent (8%) ownership share in any limited partnership organized pursuant to the scheme, to be divided equally between

Kidder Peabody and the Miller Organization; (4) an organization expense reimbursement of three percent (3%) to be divided between Kidder Peabody and the Miller organization; and (5) an additional fee of one percent (1%) of the proceeds from the sale of any properties sold by the partnerships. Moreover, the defendants agreed that the Miller Organization would receive six percent (6%) of gross rentals as a property management fee and an initial leasing fee of ten percent (10%) of aggregate dues under applicable leases for a one-time initial "rent up" of newly constructed property.

Under the scheme, Kidder Peabody also (1) devised a commission system whereby its retail brokers would be paid a substantially higher commission for selling a partnership unit in one of the three limited partnerships than they might earn on the sale of a typical comparably valued security and (2) developed a sales program and sales material which encouraged its retail brokers to solicit sales of the limited partnership units from their small, unsophisticated customers.

The Defendants also decided that pursuant to the scheme, the Miller Organization, through HSM Real Estate Securities Corporation, also would sell partnership units in these three limited partnerships to small, unsophisticated investors by methods similar to those utilized by Kidder Peabody and described above. In the case of sales made by HSM Real Estate Securities Corporation, Kidder Peabody retained one percent (1%) of the eight percent (8%) selling commission and remitted seven percent (7%) to the Miller organization.

Unsophisticated investors were targeted by Kidder Peabody and the Miller Organization because such investors were known to be more likely to purchase securities solely on the faith of the recommendation of their securities broker and would be far less likely to scrutinize the transaction than other, more sophisticated investors such as institutional investors. Indeed, Plaintiff contends that it was well known throughout the Kidder Peabody retail brokerage network that such customers did not invest on the basis of information contained in written prospectuses and offering circulars, but rather, invested based upon oral recommendations and representations made to them by their securities brokers on whose expertise they customarily relied.

From 1982 through 1986, Kidder Peabody and the Miller Organization organized three limited partnerships. The three partnerships were called KP/Miller Realty Growth Fund I ("Fund I"), KP/Miller Realty Growth Fund II ("Fund II") and KP/Miller Realty Growth Fund III ("Fund III"). Utilizing the sales methods described above, Kidder Peabody and the Miller Organization sold shares in the three limited partnerships to over 6,000 investors, including the plaintiff, thereby raising approximately $85 million. The plaintiff purchased 40 units of Fund II on June 7, 1984. Purchasing each unit for $500, the plaintiff invested a total of $20,000 in the limited partnership. The Plaintiff never purchased any limited partnership units in Fund I or Fund III.

During this time period (beginning in 1982 and continuing until mid-1986), Kidder Peabody routinely communicated with its retail brokers in its branch offices about these limited partnerships by means of an internal

interstate wire communications system, announcing, *inter alia*, the availability of the limited partnership units, describing them as safe, non-speculative, conservative investments suitable for low net worth Kidder Peabody customers having conservative investment objectives and a low tolerance for risk and urging the brokers to solicit sales of the limited partnership units from their customers.

In turn, sales of the limited partnership units were solicited over the telephone by representatives of Kidder Peabody and the Miller Organization. In so soliciting, the representatives both made a number of misrepresentations[2] and failed to disclose a number of material

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[2] Specifically, the following misrepresentations were made: (1) that the limited partnership units were suitable investments for small investors having a total net worth exclusive of their homes and personal property of only $30,000 and household incomes in excess of $30,000 to invest as much as 25% of such total net worth; (2) that the limited partnership units were suitable investments for conservative investors whose primary investment objectives were preservation of capital and capital appreciation and who did not wish to purchase speculative investments; (3) that the limited partnership units were suitable investments for fiduciaries, individual IRAs and other retirement accounts because of their low risk and good prospects for capital appreciation; (4) that the limited partnership units were not speculative investments; (5) that the low level of risk inherent in the limited partnership units placed them in the least investment risk category; (6) that investors could reasonably expect significant appreciation in the value of their investments which would be realized when the partnerships were liquidated; (7) that Kidder Peabody and the Miller Organization had designed and developed the limited partnerships exclusively for their customers for the principal purpose of providing their customers with a conservative

facts,[3] all designed to snare unsophisticated investors. When the Defendants instructed their representatives to make the foregoing representations, the Defendants either knew the representations were false or instructed their representatives to make them in reckless disregard of their truth or falsity. The 6000 investors in the three limited partnerships purchased their units in the limited partnerships in reliance upon these misrepresentations and omissions.

As stated, the Plaintiff individually purchased 40 units of Fund II. This purchase was made in reliance on the recommendation and representations of his Kidder Peabody broker, Charles Chewning, during a telephone conversation on or about June 7, 1984. Specifically, the plaintiff was told by Mr. Chewning that investments in

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means to obtain capital appreciation with a low risk of loss; and (8) that Kidder Peabody had a high level of expertise in selecting suitable real estate investments. Complaint, ¶ 24.

[3] The following material facts were not disclosed to the investors in the limited partnership units: (1) that the primary purpose of the limited partnerships was to permit Kidder Peabody and the Miller Organization to earn excessive fees and income by stripping out an unreasonable portion for the limited partnerships' equity for their own benefit; (2) that the selling commission earned by Kidder Peabody, the Miller Organization and their representatives were four to five times higher than the standard sales commissions they earned in selling a comparable dollar amount of typical stocks and bonds; (3) that in light of the fees, commissions and partnership shares taken by the defendants and the risks inherent in the program, the likelihood that the investors would ever actually realize a profit on their investments was low; and (4) that the real estate market in the south and southwest had become over-built and highly speculative. Complaint, ¶ 26.

this limited partnership were in the lowest risk category and were suitable for the most conservative investors having as their principal investment objective the preservation of capital and that Kidder, Peabody & Co., Incorporated had a high level of expertise in selecting suitable real estate investments and had designed and developed the limited partnerships for Kidder, Peabody & Co., Inc. customers for the principal purpose of providing them with a conservative means to obtain capital appreciation with a low risk of loss.

For several years after the initial offering of the partnership units, Kidder Peabody made a secondary market in the partnership units. As a result of this participation in the secondary market, Kidder Peabody and Miller obtained actual knowledge of the fair market value of the three limited partnership units. These units never traded in the secondary market at prices equal to or exceeding the initial investor cost. In fact, the units always traded at very substantial discounts to the initial cost.

Although the Defendants knew of the fair market value of the partnership units and that they were always substantially under their initial cost, Kidder Peabody and the Miller Organization concealed the true value of the limited partnership funds from their customers and deliberately misrepresented the value of the investments on monthly account statements mailed to each investor through the United States mails. Further, Kidder Peabody continued this practice of actively concealing the value of the limited partnership investments until approximately February 1, 1994 when it mailed account statements for the period ending January 31, 1994. These account statements, for the first time, alerted investors in the limited

partnerships that the value of their partnership investments may have depreciated.

Finally, continually from 1984 until the present, Kidder Peabody and the Miller Organization have continuously concealed from those who invested in the three limited partnership funds the fact that the investors could expect to realize only approximately fifteen percent (15%) of their initial investment upon liquidation of the partnerships – i.e. that the investors had lost approximately eighty-five percent (85%) of their initial investment. Further, the Defendants have continued until the present day to misrepresent and fail to disclose the true value of the partnership units to the investors and continue to charge excessive fees to the partnerships.

LEGAL ANALYSIS

The Defendants raise several arguments in support of their Joint Motion to Dismiss the Plaintiff's Complaint for Failure to State a Claim. First, the Defendants argue that the Plaintiff lacks standing to bring suit with respect to Funds I and III because he only purchased limited partnership units in Fund II and thus, has no interest in Funds I or III. Second, the Defendants argue that the gist of the Plaintiff's Complaint is that the Defendants committed fraud in marketing the partnership interests in Fund II and therefore, because (1) the Plaintiff purchased his limited partnership units in 1984, more than ten years before the Plaintiff instituted the instant lawsuit, (2) the allegedly fraudulent marketing efforts ceased when the interests in Fund II were fully sold to investors in late

1984 and (3) the assertion by the Plaintiff that the Defendants committed predicate acts of mail fraud that allegedly concealed the true value of the limited partnership units substantially postdate, are unrelated to the marketing of the units and never occurred, the Plaintiff's claims are time barred under the four-year statute of limitations applicable to civil claims under RICO. Third, the Defendants contend that even if the Plaintiff's claims are considered on the merits, the Plaintiff has failed to adequately allege the essential elements of a viable cause of action under RICO in that the Plaintiff has failed to allege (1) any cognizable "pattern" of racketeering activity and (2) viable predicate acts of securities fraud, wire fraud and/or mail fraud. Finally, the Defendants argue that because there are no viable federal claims, the court has no basis to exercise supplemental jurisdiction over the Plaintiff's state law claims, claims that they contend also are time-barred.

A. *Standing.*

As stated, the Defendants first argue that the Plaintiff has no standing to pursue a RICO claim with respect to Funds I or III.[4] Pursuant to 18 U.S.C. § 1964(c), "[a]ny

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[4] As a point of clarification, my decision as to the plaintiff's standing to bring his various § 1962 claims is not determinative of the issue of whether the plaintiff has standing to serve as a class representative with regard to this action. As explained in *re Scott Paper Company Securities Litigation*, 142 F.R.D. 611 (E.D. Pa. 1992):

> [w]hen deciding a class certification motion, the issue of standing concerns the question of whether the

person injured in his business or property by reason of a violation of § 1962 of this chapter" is entitled to bring a civil action in federal court. Thus, "[r]ecovery under section 1964(c) . . . requires the pleading [by the plaintiff] of

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> claims of the named plaintiff are typical of those of the absent class members, as prescribed by [Fed. R. Civ. P.] 23. . . . Rule 23 only requires that the representative's claim be typical of the claims or defenses of the class; it does not require that the class representative has standing for each of the claims. It [the standing requirement] is simply that an aspiring class representative "must be a member of the class and suffer injury common to the class".

Id. at 614 (citation omitted).

Also, I find it necessary to address a statement made by the plaintiff with respect to his argument that he has standing as to all of the funds and that the defendants have confused the issue of standing with the issue of whether the plaintiff is an adequate class representative under Fed. R. Civ. P. 23(a)(1). Specifically, the plaintiff cites *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186 (3d Cir. 1990), for the proposition that "the merits of the complaint must be viewed in the context of the claims of the class as a whole, not those of the specific named plaintiffs. . . . " Memorandum of Law in Support of Plaintiff's Response to Defendants' Joint Motion to Dismiss for Failure to State a Claim or, in the Alternative, for Summary Judgment ("Plaintiff's Opposition Memorandum"), p. 8 n. 5. It must be emphasized that this rule cited to by the plaintiff is only applicable when the class has been certified, which is not the case in the matter *sub judice*. "Once the district court certified the class, . . . the relevant question for the purposes of determining plaintiffs' entitlement to preliminary relief became whether the class *as a whole* was likely to succeed on the merits. . . . " *Id.* at 201. Therefore, not having made any class certification decision in the instant matter, in ruling on the Joint Motion, the Court is focusing only upon those claims made by the plaintiff in his individual capacity and not those of the class as a whole.

(1) a section 1962 violation, and (2) an injury to business or property by reason of such violation." *Shearin v. E.F. Hutton Group, Inc. et al.*, 885 F.2d 1162, 1164 (3d Cir. 1989). Significantly, the Plaintiff admits that he has not suffered losses in either Fund I or Fund III, but merely seeks to represent the class members who have suffered such losses. Plaintiff's Opposition Memorandum, p. 8.

1. The plaintiff's claims under 18 U.S.C. § 1962(b).

Under the pertinent part of 18 U.S.C. § 1962(b), it is unlawful:

> for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce.

As the Plaintiff readily admits, "[t]o state a claim under section 1962(b), a plaintiff must show injury from the defendant's acquisition or control of an interest in *a RICO enterprise.*" Plaintiff's Opposition Memorandum, p. 6; *see also Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1190 (3d Cir. 1993) (emphasis added). Thus, at the motion to dismiss level, to have a sufficient § 1962(b) claim, a plaintiff must allege how the defendant's "acquisition of interest" or "control" of the enterprise injured the plaintiff. "[A] well-pled complaint under section 1962(b) . . . requires the assertion of an injury independent from that caused by the pattern of racketeering." *Lightning Lube, Inc.*, 4 F.3d at 1191.

The Plaintiff alleges that "[t]he association in fact between Kidder, Peabody and [the] Miller [Organization]

constitutes an enterprise within the meaning of 18 U.S.C. § 1962(b) and (c), as does each of the three KP/Miller partnerships."[5] Complaint, ¶ 51. The Plaintiff further alleges that "Kidder, Peabody and [the] Miller [Organization], through the above-mentioned pattern of racketeering activity, acquired and maintained a substantial ownership interest in the KP-Miller partnerships in violation of 18 U.S.C. § 1962(b)." Complaint, ¶ 53.

Before applying the above-stated law to the Plaintiff's allegations that the defendants violated § 1962(b) and caused him injury, it is important to first emphasize that although, as stated, the Plaintiff has alleged the existence of four separate enterprises, he has alleged a § 1962(b) violation against only three of the four enterprises, specifically "the KP-Miller partnerships". *See* Complaint, ¶ 53. Accordingly, I will only address whether the Plaintiff has standing to bring a § 1962(b) claim with respect to these three "enterprises" – i.e. Fund I, Fund II and Fund III.

Accordingly, having reviewed the law in this area as well as the parties' briefs on the issue, I hold that because the Plaintiff's personal injury is related only to the Fund II limited partnership in which he purchased an interest, the plaintiff only has standing to bring a § 1962(b) claim with regard to the Fund II limited partnership. He does not have standing to allege violations of § 1962(b) as to

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[5] An enterprise is defined at 18 U.S.C. § 1961(4) to include: "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." The Third Circuit court has held that an association of corporations for illicit purposes can constitute an enterprise. *Shearin*, 885 F.2d at 1165-66.

the other two enterprises, Fund I and Fund III, because he has not shown, and cannot show, injury from the defendants' acquisition or control of an interest in either Fund I or Fund III through a pattern of racketeering activity.

2. The Plaintiff's claims under 18 U.S.C. § 1962(c).

The Plaintiff also alleges that "Kidder, Peabody and the Miller Organization conducted and/or participated in the conduct of the affairs of the Kidder, Peabody-Miller enterprise and the partnerships through the above-mentioned pattern of racketeering activity in violation of 18 U.S.C. § 1962(c)." Complaint, ¶ 54. Thus, with respect to his § 1962(c) claims, the Plaintiff is implicating all four of the alleged enterprises.

Under the pertinent part of 18 U.S.C. § 1962(c), it is unlawful for:

> any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

With regard to a plaintiff having the requisite standing to bring a claim pursuant to § 1962(c), the United States Supreme Court has stated that:

> [a] violation of § 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The plaintiff must, of course, allege each of these elements to state a claim. . . . In addition, the plaintiff only has standing if, and only can recover to the extent

> that, he has been injured in his business or property by the conduct constituting the violation.

Sedima, S.P.R.L. v. Imrex Company, Inc., 473 U.S. 479, 496, 105 S. Ct. 3275, 3285 (1985).

Applying this law to the facts of the matter *sub judice*, the Plaintiff has sufficiently alleged facts to support his having standing to bring a § 1962(c) claim against the Defendants with regard to their activity with respect to the Fund II and Kidder Peabody/Miller association-in-fact "enterprises." To the contrary, the Plaintiff has not alleged, and cannot allege, injury to his business or property as a result of the Defendants' conduct with respect to the Fund I and Fund III "enterprises," other than that the conduct of the Kidder Peabody/Miller association-in-fact involved organizing, promoting, sponsoring and managing Funds I and III.

3. The Plaintiff's claims under 18 U.S.C. § 1962(d).

The Plaintiff has also alleged that "[t]he foregoing scheme constitutes a conspiracy between and among Kidder, Peabody and the Miller organization in violation of 18 U.S.C. § 1962[d]." Complaint, ¶ 55. 18 U.S.C. § 1962(d) states that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." Again, for the reasons set forth above, as pled, the plaintiff does have standing to assert a § 1962(d) conspiracy claim against the Defendants only with respect to the Fund II and Kidder Peabody/Miller association-in-fact enterprises.

B. The remaining issues raised by the Defendants.

With respect to the remaining numerous issues raised by the Defendants in their Joint Motion and supporting briefs, it is my decision that at this preliminary stage of the litigation it is the most prudent course to deny the remainder of the Defendants' Joint Motion without prejudice to renew any or all of these issues in a motion for summary judgment after discovery has been completed. The rationale upon which this determination is based is my concern with the complexity of the matter. The Plaintiff's claims against the Defendants allege a complicated, multi-faceted scheme by sophisticated businesses and businesspersons to defraud unsophisticated investors. The information relevant to the Plaintiff's claims lies in the possession and knowledge of the Defendants. *Craftmatic Securities Litigation v. Kraftsow*, 890 F.2d 628, 645 (3d Cir. 1989) ("[c]ourts must be sensitive to the fact that application of Rule 9(b) prior to discovery 'may permit sophisticated defrauders to successfully conceal the details of their fraud.' Particularly in cases of corporate fraud, plaintiffs cannot be expected to have personal knowledge of the details of corporate internal affairs. Thus, courts have relaxed the rule when factual information is peculiarly within the Defendant's knowledge or control"); *Chambers Development Company, Inc. v. Browning-Ferris Industries*, 590 F. Supp. 1528 (W.D. Pa. 1984) (same). In other words, it is my determination that under the facts of the instant matter, it is better to await the confrontation of the issues raised by the Defendants in their Joint Motion until after evidence is available rather than to attempt to resolve the issues in an evidentiary

"vacuum" where a meritorious claim possibly could be shortchanged.

Thus, in that I cannot at this time hold that "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claims which would entitle him to relief" the Defendants' Joint Motion must be dismissed as to all issues but the standing issue previously addressed. *Conley*, 355 U.S. at 45-46. Notably, however, in so holding, I must state that the Defendants have raised several persuasive arguments which, if proven by the facts, arguably will be dispositive of the case.

****

DATE FILED: DECEMBER 19, 1995

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN W. MATHEWS, on behalf of, himself and all others similarly situated,	)	
Plaintiff,	)	Civil Action No. 95-85
-vs-	)	
KIDDER, PEABODY & CO., INC., a Delaware corporation, KP REALTY ADVISORS, INC., a Delaware corporation, HSM, INC., a Texas corporation, HENRY S. MILLER CO., HENRY S. MILLER MANAGEMENT CORPORATION, HENRY S. MILLER APPRAISAL CORPORATION, HSM REAL ESTATE SECURITIES CORPORATION, and MILLER REAL ESTATE SERVICES CORPORATION, a Texas corporation,	)	
Defendants.	)	

AMBROSE, District Judge.

ORDER OF COURT

AND NOW, this **19th** day of December, 1995, after careful consideration and for the reasons set forth in the Opinion accompanying this Order, it is hereby **ORDERED** that the Defendants' Joint Motion to Dismiss (Docket #: 10) is **GRANTED** as to the issue of Plaintiff's standing to pursue a RICO claim with respect to Funds I and III. As to all other matters, Defendants' Joint Motion to Dismiss (Docket #: 10) is **DENIED.**

BY THE COURT:

/S/ Donetta W. Ambrose
Donetta W. Ambrose,
U.S. District Judge

PC ALL COUNSEL OF RECORD
BUREAU OF NATIONAL AFFAIRS
MATTHEW BENDER & COMPANY

FILE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN W. MATHEWS, on behalf of himself and all others similarly situated,	)	
Plaintiff,	)	
-vs-	)	Civil Action
KIDDER PEABODY & CO., a Delaware corporation, KP REALTY ADVISERS, INC., a Delaware corporation, HSM INC., a Texas corporation, HENRY S. MILLER CO., HENRY S. MILLER MANAGEMENT CORPORATION, HENRY S. MILLER APPRAISAL CORPORATION, HSM REAL ESTATE SECURITIES CORPORATION, and MILLER REAL ESTATE SERVICES CORPORATION, a Texas corporation,	)	No. 95-85
Defendants.	)	

AMBROSE, District Judge.

OPINION

and

ORDER OF COURT

Pending before the Court is the Motion of Plaintiffs for Class Certification pursuant to Federal Rule of Civil Procedure 23. Plaintiff John W. Mathews initiated this civil action in January, 1995, against Defendants to collect

damages for alleged violations of 18 U.S.C. § 1962(b), (c), and (d) of the Racketeer Influenced and Corrupt Organization Act. ("RICO") and state law claims of breach of fiduciary duty and negligent misrepresentation. For the reasons set forth below, Plaintiffs' Motion for Class Certification will be granted.

Plaintiffs' proposed class includes "all persons residing in the United States (excluding Defendants and their directors, officers, agents, servants, and affiliates) who purchased partnership units in KP/Miller Realty Growth Fund I, KP/Miller Realty Growth Fund II, and KP/Miller Realty Growth Fund III in the initial offering of such securities." Defendants oppose the certification of this class.

In determining whether this proposed class should be certified, we are guided by Fed.R.Civ.P. 23 which provides:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of:

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

. . .

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be

encountered in the management of a class action.

Fed. R. Civ. P. 23.

It is Plaintiff's burden, as the moving party, to establish that all of the requirements of Rule 23 have been met. *Hoffman Elec., Inc. v. Emerson Elec. Co.*, 754 F. Supp. 1070, 1075 (W.D. Pa. 1991). "[I]n a doubtful case any error, if there is to be one, should be committed in favor of allowing the class action." *Id.* Usually, the requirements under Fed. R. Civ. P. 23 (a) are addressed with reference to the following categories: numerosity, commonality, typicality, and adequacy of representation. *See Id.* at 1075-1078. *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). The Plaintiffs also argue that the putative class should be certified pursuant to both Rule 23(b)(2) and Rule 23(b)(3). Therefore, I will also address the additional issues of (1) the appropriateness of final injunctive relief or corresponding declaratory relief with respect to the class as whole, (2) predominance of the common questions of law or fact pertaining to the class as opposed to individual questions, and (3) whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Hoffman*, 754 F. Supp. at 1078-79, *citing* Fed. R. Civ. P. 23(b)(3); *Eisen* 417 U.S. at 163.

A court may not consider the merits of the Plaintiffs' case in determining the certification motion. *Eisen*, 417 U.S. at 178.

1. **Numerosity**

The numerosity requirement is met if the class is "so numerous that joinder of all members is impracticable." *Hoffman*, 754 F. Supp. at 1075. "Impractical, however, does not mean impossible." *Id.* The class proposed by Plaintiffs consists of thousands of investors. (Plaintiffs' Brief at p. 8). This is within a number which the Third Circuit has held sufficient to meet the numerosity requirement. *See Welch v. Board of Directors of Wildwood Golf Club*, 146 F.R.D. 131 (W.D. Pa. 1993). The Defendants do not contest this point and I hold that the numerosity requirement of Rule 23(a)(1) is satisfied.

2. **Common Questions of Law & Fact**

The common questions of fact and law that are present in this action are set forth in Plaintiffs' Brief on pages 9 and 10. Defendants do not dispute that common questions of fact and law exist. The commonality requirement is satisfied if the named Plaintiffs share at least one question of fact or law with the grievances of the prospective class. *In re Agent Orange Prod. Liab. Lit.*, MDL No. 381 818 F.2d 145, 166-67 (2d Cir. 1987), *cert den'd*, 484 U.S. 1004 (1988). This requirement is easily met and has been "permissively applied to a large variety of factual circumstances including allegations of conspiracy and securities fraud." *Piel v. National Semiconductor Corp.*, 86 F.R.D. 357, 367 (E.D. Pa. 1980). I hold that Plaintiffs have satisfied their burden in demonstrating commonality.

3. **Typicality**

"Typicality exists when the legal or factual positions of the class representatives are sufficiently similar to the legal or factual positions of the other class members." *Welch*, 146 F.R.D. at 135. While Plaintiffs' claims must be typical of the proposed class, they need not be identical. *Id.* In this case, Plaintiffs allege that the Defendants engaged in a "common course of fraudulent conduct to conceal the poor revenues, earnings, management, products, markets, financial condition and business prospects from the unsuspecting investing public of the company whose stock was being offered." (*See* Plaintiffs' Brief, p. 12). Plaintiffs allege that the typicality requirement of Rule 23(a)(3) is satisified [sic] by the allegations of Defendants' common course of fraudulent conduct.

Defendants argue strenously [sic] that Plaintiffs cannot meet the typicality requirement of Rule 23(a)(3). First, Defendants argue that Plaintiff Mathews cannot have claims typical of others who invested in Funds I or III because he has no interest in those Funds. As I held in the Opinion and Order granting Plaintiff Mathews' Motion for Leave to File First Amended Complaint filed simultaneously with this Opinion and Order, Plaintiff Mathews does have standing to litigate the alleged impropriety of Defendants' conduct and to assert the RICO claim contained in the First Amended Complaint. Plaintiff Mathews is merely limited in recovery to the injury he suffered with respect to Fund II. Furthermore, those individuals who have been added as parties plaintiff by my Opinion and Order granting Plaintiff Mathews' Motion

for Leave to File First Amended Complaint, include individuals who invested in all three (3) of the Funds. Therefore, Defendants' assertion that Plaintiff Mathews is also not a proper representative of persons who invested in Fund II does not require a contrary result.

Typicality requires an inquiry into whether "the named Plaintiff's individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." *Weirs v. York Hospital*, 745 F.2d 786, 809 n.36 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed. 2d 836 (1985).

In this case the claims of the named Plaintiffs (including Plaintiff Mathews) are not untypical because they may have invested in different Funds. Plaintiffs' allegations of a common course of fraudulent conduct and large unitary scheme satisfy the typicality requirement of Rule 23(a)(3).

4. **Adequacy Of Representation**

Rule 23(a)(4) requires that the representative parties fairly and adequately protect the interest of the class. In determining whether this requirement has been met, I must determine: (1) whether Plaintiffs have interests antagonistic to those of the class; and (2) whether Plaintiffs' attorney is qualified to conduct the proposed litigation. *Hoffman*, 754 F.Supp. at 1076.

Defendants have not addressed the adequacy of representation in their Brief. Plaintiffs' counsel is both experienced and competent. Defendants do not argue

otherwise. Defendants also do not argue that Plaintiffs have interests antagonistic to those of the class. Therefore, I hold that the requirement of Rule 23(a)(4) has been met.

5. **Requirements of Rule 23(b)(2)**

In my Opinion and Order granting Plaintiff Mathews' Motion for Leave to File Amended Coınplaint, I held that passage of the Private Securities Litigation Reform Act of 1995 affected Plaintiffs' request for injunctive relief in Count I of the First Amended Complaint and denied Plaintiff Mathews' request to amend his Complaint to include in the RICO count a request for injunctive relief. In light of this ruling, Plaintiffs cannot satisfy the requirement of Rule 23(b)(2). However, since Plaintiffs need only satisfy the requirements of one subdivision of Rule 23(b), I will now examine whether Plaintiffs have satisfied the requirements of Rule 23(b)(3), the other subdivision under which Plaintiffs argue that the class should be certified.

6. **Predominance**

I must next determine whether the common questions of fact and law pertaining to the class predominate over any individual questions. Rule 23(b)(3). Plaintiffs claim that the common questions concerning Defendants' alleged common course of fraudulent conduct and Defendants' alleged material misrepresentations and omissions "overwhelm any individual questions." (Plaintiffs' Brief, p. 15). Defendants contend that "individual issues of causation, reliance, materiality and notice of claims. . . .

overwhelm any common issues. . . . " (Defendants' Brief, p. 13).

Defendants' arguments are unpersuasive for the following reason. Plaintiffs have alleged a large, unitary scheme, a common course of conduct. The central issues in this case are whether the Defendants engaged in a pattern of racketeering activity and whether Defendants made material false and misleading statements. These issues are common to all members of the class. Plaintiffs' claims arise from the same alleged course of conduct which allegedly gave rise to the claims of the other class members.

Furthermore, the existence of the issue of different types of reliance is not sufficient to defeat class certification. *See In re Data Access Systems Securities Litigation*, 103 F.R.D. 130, 139 (D.N.J. 1984), ("If Defendants' argument were to prevail that factual differences of this nature were sufficient to defeat class action certification, there could never be a class action of securities purchasers.") Plaintiffs contend that they and other members of the class were injured from a single fraudulent scheme. This contention, which is common to all members of the class, clearly predominates over any individual issues, such as reliance, which are secondary to the predominant assertion. Each of the Plaintiffs' claims will focus on Defendants' conduct to establish a RICO violation. The issues of fact and law involved in establishing a RICO violation are common to all class members because Plaintiffs are asserting a single fraudulent scheme by which Defendants injured each Plaintiff. The burden of establishing a RICO violation involves significant common issues which predominate over individual issues. Therefore, I find that

there exist common questions of fact and law which predominate over any individual questions.

7. **Superiority**

Finally, I must determine whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Rule 23(b)(3). Factors to be considered in determining whether the class action is a superior method of adjudication include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability (or undesirability) of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action. Fed. R. Civ. P. 23(b)(3). *See also Hoffman,* 754 F. Supp. at 1079.

Plaintiffs assert that "thousands of investors have been harmed by the Defendants' actions, "and that "a class action [would] promote the just, speedy, and inexpensive determination of this action. (Plaintiffs' Brief, p. 16). Defendants assert that a class action would not be superior since common issues do not predominate. (Defendants' Brief, p. 19).

I find that a class action is a superior method of adjudication in this case. Determining the issues of Defendants' civil RICO liability and liability for breach of fiduciary duty and negligent misrepresentation in one action will be more efficient and effective for all parties.

I conclude, therefore, that Plaintiffs have met their burden of establishing all the requirements under Rule 23 for class certification. Plaintiff's Motion will be granted.

##

DATE FILED:	SEPTEMBER 26, 1996
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN W. MATHEWS, on behalf of himself and all others similarly situated, Plaintiff, -vs- KIDDER PEABODY & CO., a Delaware corporation, KP REALTY ADVISERS, INC., a Delaware corporation, HSM INC., a Texas corporation, HENRY S. MILLER CO., HENRY S. MILLER MANAGEMENT CORPORATION, HENRY S. MILLER APPRAISAL CORPORATION, HSM REAL ESTATE SECURITIES CORPORATION, and MILLER REAL ESTATE SERVICES CORPORATION, a Texas corporation, Defendants.	)	Civil Action No. 95-85

AMBROSE, District Judge.

ORDER OF COURT

AND NOW, this **26th** day of September, 1996, after careful consideration of the submissions of the parties, and for the reasons set forth in the Opinion accompanying this Order, it is hereby **ORDERED** that the Motion for

Class Certification pursuant to Fed. R. Civ. P. 23 (Docket #: 38) filed by the Plaintiffs is **GRANTED.**

BY THE COURT:

/s/ Donetta W. Ambrose
Donetta W. Ambrose,
U. S. District Judge

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